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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CONSOLIDATION COAL COMPANY ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an otherwise unconstitutional tax imposed upon the sale of goods in the stream of export commerce saved from invalidation under the Export Clause by recharacterizing it as a deferred tax on manufacturing?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Consolidation Coal Company, Consol of Pennsylvania Coal Company, Consol of Kentucky Inc., Eighty Four Mining Company, Helvetia Coal Company, Island Creek Coal Company, Kent Coal Mining Company, Keystone Coal Mining Corporation, Laurel Run Mining Company, McElroy Coal Company, Ninevah Coal Company, Quarto Mining Company, Eagle Energy, Inc., Elk Run Coal Company, Inc., Goals Coal Company, Green Valley Coal Company, Independence Coal Company, Inc., Knox Creek Coal Corporation, Marfork Coal Company, Inc., Martin County Coal Corporation, Peerless Eagle Coal Company, Performance Coal Company, Rawl Sales & Processing, Sidney Coal Company, Inc., Stone Mining Company, Jim Walter Resources, Inc., Eastern Associated Coal Corporation, Kingston Resources, Inc., Pioneer Fuel Corporation, Powder River Coal Company, Apogee Coal Company, Arch Western Resources, LLC, Canyon Fuel Company, LLC, Catenary Coal Company, Coal-Mac, Inc., Dal-Tex Coal Corporation, Hobet Mining, Inc., Mingo Logan Coal Co., Paynter Branch Mining, Inc., Plateau Mining Corporation, RAG Cumberland Resources, L.P., RAG Emerald Resources, L.P., Twentymile Coal Company, Coastal Coal Company, LLC, Coastal Coal-West Virginia, LLC, Evergreen Mining Company, Mid-Vol Leasing, Inc., Mountaineer Coal Development Company, Old Ben Coal Company, Shipyard River Coal Terminal Company, Riverside Energy, Inc., Virginia Crews Coal Company, Clintwood Elkhorn Mining Company, Gatliff Coal Company, Premier Elkhorn Coal Company, Perry County Coal Corporation, Glamorgan Coal Company, LLC, Terry Eagle, L.P., Nicholas-Clay Land & Mineral, Inc., Nicholas-Clay Company, LLC, Andalex Resources, Inc., Genwal Resources, Inc., Pacific Coast Coal Company, Usibelli Coal Mine, Inc., West Ridge Resources, Inc., United States Steel Mining Company, LLC, and Covenant Coal Corporation, and Wellmore Energy Company, LLC (formerly known as Rapoca Energy Company, LLC), and were the plaintiffs-appellants below.

The United States is respondent and was the defendant-appellee below.

RULE 29.6 STATEMENT

All parent corporations and any publicly held companies that own 10 percent or more of the stock of petitioners are (*italics* indicate publicly held):

Named Party	**Parent Corporations and any Publicly Held Company that Owns 10 Percent or More of the Named Party**
Consolidation Coal Company	*Consol Energy Inc.*
Consol of Pennsylvania Coal Company (n/k/a CONSOL Pennsylvania Coal Company LLC)	*Consol Energy Inc.*
Consol of Kentucky Inc.	*Consol Energy Inc.*
Eighty Four Mining Company	CONSOL Financial Inc. *Consol Energy Inc.*
Helvetia Coal Company	Rochester & Pittsburgh Coal Company Consolidation Coal Company *Consol Energy Inc.*
Island Creek Coal Company	Consolidation Coal Company *Consol Energy Inc.*

Kent Coal Mining Company	(merged in 2001 into co-plaintiff Keystone Coal Mining Corporation) Rochester & Pittsburgh Coal Company Consolidation Coal Company *Consol Energy Inc.*
Keystone Coal Mining Corporation	Rochester & Pittsburgh Coal Company Consolidation Coal Company *Consol Energy Inc.*
Laurel Run Mining Company	Island Creek Coal Company Consolidation Coal Company *Consol Energy Inc.*
McElroy Coal Company	Consolidation Coal Company *Consol Energy Inc.*
Nineveh Coal Company	(merged in 2002 into co-plaintiff Consol of Pennsylvania Coal Company n/k/a CONSOL Pennsylvania Coal Company LLC) *Consol Energy Inc.*

Quarto Mining Company	(merged in 2005 into co-plaintiff Consolidation Coal Company) *Consol Energy Inc.*
Eagle Energy, Inc.	Long Fork Coal Company A.T. Massey Coal Company, Inc. *Massey Energy Company*
Elk Run Coal Company, Inc.	A.T. Massey Coal Company, Inc. *Massey Energy Company*
Goals Coal Company	Performance Coal Company Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Green Valley Coal Company	Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Independence Coal Company, Inc.	Elk Run Coal Company, Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*

Knox Creek Coal Corporation	Martin County Coal Corporation A.T. Massey Coal Company, Inc. *Massey Energy Company*
Marfork Coal Company, Inc.	Elk Run Coal Company, Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Martin County Coal Corporation	A.T. Massey Coal Company, Inc. *Massey Energy Company*
Peerless Eagle Coal Company	Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Rawl Sales & Processing Company	Elk Run Coal Co., Inc. A.T. Massey Coal Company, Inc. *Massey Energy Company*
Sidney Coal Company, Inc.	A.T. Massey Coal Company, Inc. *Massey Energy Company*
Stone Mining Company	Long Fork Coal Company A.T. Massey Coal Company, Inc. *Massey Energy Company*

Apogee Coal Company n/k/a Apogee Coal Company, LLC	New Trout Coal Holdings II, LLC Magnum Coal Company *Patriot Coal Corporation*
Arch Western Resources, LLC	Arch Western Acquisition Corporation *Arch Coal, Inc. owns 99% of Arch Western* Delta Housing, Inc. (1% partner) BP America, Inc. (1% partner thru Delta Housing) *BP PLC*
Canyon Fuel Company, LLC	Arch Western Resources, LLC owns 65% of Canyon Fuel Arch Western Acquisition Corporation *Arch Coal, Inc. owns 35% of Canyon Fuel* Delta Housing, Inc. (1% partner) BP America, Inc. (less than 1% partner thru Delta Housing) of Arch Western's 65% ownership *BP PLC*

Catenary Coal Company n/k/a Catenary Coal Company, LLC	Viper LLC New Trout Coal Holdings II, LLC Magnum Coal Company *Patriot Coal Corporation*
Coal-Mac, Inc.	*Arch Coal, Inc.*
Dal-Tex Coal Corporation	(merged in 1996 into co-plaintiff Hobet Mining, Inc.)
Hobet Mining, Inc. n/k/a Hobet Mining, LLC	New Trout Coal Holdings II, LLC Magnum Coal Company *Patriot Coal Corporation*
Mingo Logan Coal Co.	*Arch Coal, Inc.*
Kingston Resources, Inc.	Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Paynter Branch Mining, Inc.	Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*

Pioneer Fuel Corporation	Pioneer Mining, Inc. Riverton Coal Production Inc. Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Plateau Mining Corporation	Alpha American Coal Company, LLC Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
RAG Cumberland Resources, LP n/k/a Cumberland Coal Resources, LP	Foundation PA Coal Company, LLC Pennsylvania Service Corporation Alpha American Coal Company, LLC Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*

RAG Emerald Resources, LP n/k/a Emerald Coal Resources, LP	Foundation PA Coal Company, LLC Pennsylvania Service Corporation Alpha American Coal Company, LLC Alpha American Coal Holding, LLC *Alpha Natural Resources, Inc.*
Twentymile Coal Company n/k/a Twentymile Coal, LLC	*Peabody Colorado Operations, LLC* *Peabody Operations Holding, LLC Peabody Investments Corp.* *Peabody Energy Corporation*
Coastal Coal Company, LLC n/k/a Enterprise Mining Company, LLC	AMFIRE, LLC Maxxum Carbon Resources, LLC Alpha Natural Resources, LLC *Alpha Natural Resources, Inc.*

Coastal Coal-West Virginia, LLC n/k/a Brooks Run Mining Company, LLC	AMFIRE, LLC Maxxum Carbon Resources, LLC Alpha Natural Resources, LLC *Alpha Natural Resources, Inc.*
Eastern Associated Coal Corporation n/k/a Eastern Associated Coal, LLC	Coal Properties, LLC Heritage Coal Company LLC Interior Holdings, LLC Eastern Coal Company, LLC *Patriot Coal Corporation*
Evergreen Mining Company	Newcoal, LLC *International Coal Group, Inc.*
Mid-Vol Leasing, Inc. n/k/a Mid-Vol Coal Sales Inc.	Mid-Vol Coal Sales Inc. *ArcelorMittal*
Mountaineer Coal Development Company	Newcoal, LLC *International Coal Group, Inc.*
Old Ben Coal Company	Newcoal, LLC *International Coal Group, Inc.*
Shipyard River Coal Terminal Company	Newcoal, LLC *International Coal Group, Inc.*

Riverside Energy, Inc. (merged into AMCI Holdings, Inc. in 2005)	AMCI Holdings, Inc.
Virginia Crews Coal Company	AMCI Holdings, Inc.
Clintwood Elkhorn Mining Company	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Gatliff Coal Company	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Premier Elkhorn Coal Company	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Perry County Coal Corporation	TECO Coal Corporation TECO Diversified, Inc. *TECO Energy, Inc.*
Glamorgan Coal Company, LLC	AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*

Terry Eagle L.P.	TECPART Corporation TEAGLE Company, LLC AMVEST Coal & Rail, LLC AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*
Nicholas-Clay Land & Mineral, Inc.	AMVEST Coal & Rail, LLC AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*
Nicholas-Clay Company, LLC n/k/a AMVEST West Virginia Coal, LLC	Nicholas-Clay Land & Mineral, Inc. Terry Eagle L.P. TECPART Corporation TEAGLE Company, LLC AMVEST Coal & Rail, LLC AMVEST Minerals Company, LLC AMVEST Corporation *Consol Energy Inc.*
Andalex Resources, Inc.	UtahAmerican Energy, Inc.

Genwal Resources, Inc.	Andalex Resources, Inc. UtahAmerican Energy, Inc.
Jim Walter Resources, Inc.	*Walter Energy, Inc.*
Pacific Coast Coal Company	Pacific Coast Coal Co., Inc.
Usibelli Coal Mine, Inc.	N/A
Powder River Coal Company n/k/a Powder River Coal, LLC	*Peabody Powder River Operations, LLC* *Peabody Operations Holding, LLC Peabody Investments Corp.* *Peabody Energy Corporation*
Covenant Coal Corporation	N/A
United States Steel Mining Company LLC	*United States Steel Corporation*
West Ridge Resources, Inc.	Andalex Resources, Inc. UtahAmerican Energy, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Consolidation Coal Company et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is reported at 615 F.3d 1378. The decision of the United States Court of Federal Claims (Pet. App. 10a-24a) is reported at 86 Fed. Cl. 384. Prior decisions of the court of appeals (Pet. App. 25a-31a) and the Court of Federal Claims (Pet. App. 32a-39a) are reported at 528 F.3d 1344 and 75 Fed. Cl. 537, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2010. Pet. App. 2a. The court denied a petition for panel rehearing and rehearing en banc on October 12, 2010. Pet. App. 70a-72a. The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 9, 2011. App. No. 10A631. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Export Clause of the United States Constitution, Art. I, § 9, cl. 5, provides: "No Tax or Duty shall be laid on Articles exported from any State."

The Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq*, provides in relevant part:

> All operators of coal mining operations subject to the provisions of this Act shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 31.5 cents per ton of coal produced by surface coal mining and 13.5 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 9 cents per ton, whichever is less.

Id. § 1232(a).

The regulations implementing the SMCRA provide in relevant part:

> The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.
>
> (1) The initial bona fide sale, transfer of ownership, or use shall be determined by the first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit.
>
> (2) The value of the coal shall be determined F.O.B. mine.
>
> (3) The weight of each ton shall be determined by the actual gross weight of the coal.

> (i) Impurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator, excluding excess moisture for which a reduction has been taken pursuant to § 870.18, shall not be deducted from the gross weight.
>
> (ii) Operators selling coal on a clean coal basis shall retain records that show run-of-mine tonnage, and the basis for the clean coal transaction.
>
> (iii) Insufficient records shall subject the operator to fees based on raw tonnage data.

30 C.F.R. § 870.12(b).

STATEMENT OF THE CASE

For decades, the Government has imposed a tax upon the sale of domestically produced coal, which is assessed on the date of sale and determined based on the coal's weight and value at the time of sale. Petitioners filed this suit alleging that the tax violates the Constitution's Export Clause when applied to the sale of coal in the export stream, seeking a declaration of the tax's invalidity and a refund of previously paid assessments. U.S. Const. art. I, § 9, cl. 5. The Court of Federal Claims granted petitioners summary judgment. The Federal Circuit reversed, holding that because it would violate the Export Clause to impose a tax on the sale of coal in the stream of export commerce, the doctrine of constitutional avoidance compelled recharacterizing the tax as a deferred tax on the extraction of coal.

1. The Export Clause of the U.S. Constitution prohibits every "Tax or Duty . . . on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. This categorical provision "strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *United States v. IBM Corp.*, 517 U.S. 843, 848 (1996). Congress may tax the manufacturing of goods, including goods destined for export, but those goods become immune from federal taxation once they "enter[] the course of exportation." *Id.* at 849.

Whether a tax permissibly falls on goods prior to exportation, or instead unconstitutionally is imposed during exportation, depends on the "taxable event." *Id.* When a tax is imposed upon the *sale* of a good for export, that tax is unconstitutional because "the taxable event, the transfer of title, occur[s] at the same moment the goods entered the course of exportation." *Id.* (citing *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69-70 (1923)).

2. Federal law imposes a wide array of taxes and fees on American-made and -produced goods. Among these is a tax on coal. Congress enacted the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq.*, in 1977. The statute authorizes the Department of the Interior's Office of Surface Mining (OSM) to impose a reclamation fee on "coal produced" by covered coal mining operations. *Id.* § 1232(a). The tax is the lesser of a specified amount per ton or "10 per centum of the value of the coal at the mine." *Id.* The SMCRA does not compel OSM to impose the tax at any particular point in the process of the coal's extraction, sale, processing, and delivery.

Pursuant to the statutory authorization to impose the tax, OSM in 1977 specified by regulation issued after notice and comment that the tax would be determined by the "weight and value *at the time* of initial bona fide *sale*, transfer of ownership, or use by the operator." 30 C.F.R. § 870.12(b)(1) (emphases added).

OSM revisited the issue in 1982 "to clarify the point in time of fee determination." 47 Fed. Reg. 28,574, 28,577 (June 30, 1982). OSM specified that the requirement that the "fee shall be determined . . . at the time of the initial bona fide sale, transfer of ownership, or use" referred to the "first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit," 30 C.F.R. § 870.12(b), (b)(1) (1983). Only "the actual gross weight" of the processed coal that is sold—at the time of its sale—matters for purposes of imposing the tax. *Id.* § 870.12(b)(3).

The distinction between imposing the tax upon sale rather than the initial extraction of the coal makes a considerable practical difference. The tax depends on the coal's weight and value, 30 U.S.C. § 1232(a), both of which can change between extraction and sale. If the weight of the coal is reduced during processing by the removal of impurities, the tax is lower than if it had been imposed at extraction. Conversely, if the coal increases in weight when exposed to the elements or during processing, the tax imposed at sale may be higher than it would have been if imposed during mining or processing. OSM's regulations thus specify that "[i]mpurities, including water, that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator shall not be deducted from the gross weight." *Id.* § 870.12(b)(3)(i).

The market price for coal also can shift between the time the coal is first extracted from the ground and when it is later sold for export. OSM has consistently measured the value of the processed coal as of the time of its sale, rather than of raw coal as of the time of extraction. Pet. App. 53a-56a. Unless and until the coal is sold, no tax is imposed. *Id.*

Several coal companies filed suit against OSM's determination to impose the tax upon sale. The companies argued that by specifying that OSM should impose a fee on "coal produced," 30 U.S.C. § 1232(a), Congress had left OSM with no choice but to impose the tax on the coal at the time of extraction. OSM argued that its authority was not so limited, and that the statute could permissibly be construed to allow it to impose the tax upon sale. The D.C. Circuit accepted OSM's position, concluding that "we do not find the ordinary meaning of ['coal produced'] unambiguous." *See Drummond Coal Co. v. Hodel,* 796 F.2d 503, 505 (D.C. Cir. 1986). Hence, OSM acted within its discretion in adopting regulations that construe the statute to impose the tax at the time of sale. *Id.* at 505-08.

3. Petitioners in this case are sixty-seven domestic coal companies, which regularly enter into contracts to export coal to foreign customers. Petitioners mine the coal, move it to raw coal storage areas for temporary storage, and then feed it into a preparation plant for processing in accordance with the purchaser's specifications. *See Consolidation Coal Co. v. United States*, 54 Fed. Cl. 15, 16 (2002).

The coal is then loaded directly onto rail cars bound for the export terminal, sometimes after being stored temporarily. *Id.* The contracts specify that title passes, and thus the sale occurs, either upon loading of the coal onto the rail car at the mine for delivery to its transporting ship or at a later point in the export stream, such as upon loading onto the ocean vessel.

In 2001, petitioners filed this suit in the Court of Federal Claims. Petitioners sought a prospective declaration that the tax violates the Export Clause as applied to coal in the stream of export commerce, as well as reimbursement of taxes that had been unconstitutionally imposed.[1]

The court granted summary judgment in petitioners' favor. Pet. App. 69a. It observed that "[b]oth sides agree that the fee would be constitutional if imposed solely on extraction." Pet. App. 46a. Conversely, "given defendant's concession that the sale occurs in the export process, the fee . . . would be unconstitutional . . . if imposed at the time the coal is sold." *Id.*

Turning to the dispositive question of when the tax was assessed, the court rejected the Government's assertion that it was entitled to prevail on the ground that the statute gave OSM no choice but to impose the fee on coal when first extracted, rather than when later sold. In reality, the court recognized, the Government had previously persuaded the D.C. Circuit to uphold OSM's imposition of the tax upon sale by taking precisely the opposite position that the statutory language was ambiguous. Pet. App. 49a-51a. The Government's present arguments were accordingly unpersuasive and "directly contradicted" by the law of the D.C. Circuit. Pet. App. 49a.

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[1] The Court of Federal Claims initially dismissed the suit for lack of jurisdiction. *Consolidation Coal Co.*, 54 Fed. Cl. at 20. The Federal Circuit reversed and remanded. *Consolidation Coal Co. v. United States*, 351 F.3d 1374 (Fed. Cir. 2003).

The Court of Federal Claims further explained that OSM's position that the tax accrues upon extraction could not be reconciled with OSM's failure to tax unsold coal. In a prior case, the Government had "acknowledged that it 'does not now claim, and never has claimed, that an operator which mines coal . . . and places the coal in a coal stockpile prior to sale, should pay a reclamation fee . . . on that coal.'" Pet. App. 53a-54a (quoting *United States v. Consolidated Coal Co.*, No. 82-1077, slip op. at 3 (S.D.W. Va. Nov. 7, 1985)). That concession, the court concluded, was well-founded, as other courts had expressed the same understanding. *See* Pet. App. 54a-56a (citing *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 157 (7th Cir. 1987); *United States v. Consolidated Coal Co.*, 1987 WL 36307, at *1 (4th Cir. 1987) (unpublished); *United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 127 (N.D.W. Va. 1992)).

Accordingly, because OSM imposed the tax "upon the sale of coal," and because (as the Government conceded) that sale occurred while the coal was in the export stream, the tax was unconstitutional. Pet. App. 56a, 69a.

4. On the Government's appeal, the Federal Circuit reversed. Preliminarily, the court of appeals accepted the central premise of petitioners'

argument: that a tax on the sale of coal bound for export would violate the Export Clause. Pet. App. 28a. The Federal Circuit also recognized that OSM determined the taxable weight and value of the coal at the time of sale, not extraction. Pet. App. 28a, 29a.

The Federal Circuit nonetheless deemed OSM's actual application of the tax irrelevant as a matter of law. Precisely because such a tax on the sale of coal bound for export would violate the Export Clause, the Federal Circuit asked instead whether the statute should be construed to contemplate that OSM would impose the tax upon initial extraction. Applying the doctrine of constitutional avoidance, the court construed the statute to tax only "coal extracted." *Id.* 29a.

The Federal Circuit recognized that in *Drummond Coal*, OSM had successfully taken the opposite position that it permissibly had imposed the tax upon the sale of coal. The D.C. Circuit had thus determined in *Drummond Coal* that the SMCRA was ambiguous and could reasonably be read by OSM to "include the entire process of extracting and selling coal," rather than "solely . . . the process of extraction." 796 F.2d at 505. The Federal Circuit, by contrast, concluded that the D.C. Circuit's interpretation would render the tax unconstitutional: if SMCRA encompassed the "entire process of extracting and selling coal – if it is a tax on extraction *and* sale – then, as it applies to sales that occur in the export process, it is an unconstitutional violation of the Export Clause." Pet. App. 28a.

The Federal Circuit believed that OSM's interpretation of the tax was overridden by the court's obligation to interpret the statute in a constitutional manner. The Federal Circuit deemed *Drummond Coal* to be irrelevant because the D.C. Circuit "did not itself independently determine the meaning of the statutory term 'coal produced,' but instead gave *Chevron* deference to the regulatory definition of that term, which included post-extraction moisture and other impurities as part of the 'coal produced.'" Pet. App. 30a. In the view of the Federal Circuit, the courts are not "bound by any contrary assertions by the government regarding the statutory interpretation of 'coal produced' where the canon of constitutional avoidance mandates that we adopt the reasonable construction that as applied to the SMCRA reclamation fee 'coal produced' is limited to 'coal extracted.'" Pet. App. 30a.

5. The Federal Circuit remanded the case to the Court of Federal Claims for further proceedings. Pet. App. 31a. On remand, petitioners argued that the court of appeals' decision resolved only the prospective construction of the SMCRA, and did not preclude petitioners' right to reimbursement of taxes that OSM had in fact imposed on the sale of coal in export commerce. The court disagreed, holding that the Federal Circuit's decision entirely precluded petitioners' claim under the Export Clause. The court accordingly entered judgment in favor of the Government. Pet. App. 22a-23a.

6. On petitioners' appeal, the Federal Circuit affirmed. The court of appeals again invoked the doctrine of constitutional avoidance, deeming OSM's regulations implementing the SMCRA to apply only to the extraction of coal in order to avoid their invalidation under the Export Clause. Pet. App. 7a-8a. "The regulations, like the statute, use the term

'coal produced,' and we conclude that this term in the regulation must be construed consistent with the identical term in the statute. 'Coal produced' applies to 'coal extracted' rather than coal sold.'" *Id.*

The Federal Circuit concluded that OSM's actual practice of imposing the tax upon the sale of exported coal was no barrier to the court's recharacterization of the tax as a deferred assessment on the production of coal. In support, it relied on this Court's analysis of the constitutional principle that states are immune from federal taxation in *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383 (1937). *See* Pet. App. 6a-8a. *Liggett* held that a federal tax on tobacco manufacturing did not violate the rule against federal taxation of state instrumentalities when applied to tobacco sold to a state institution. The Court reasoned that the fact that the tax was not payable until the tobacco left the factory or was sold (whichever came first) did not turn an otherwise unobjectionable manufacturing tax into an impermissible sales tax upon state purchases. 299 U.S. at 386. By analogy, the Federal Circuit concluded in this case, the reclamation fee could be characterized as a delayed tax on coal extraction, rather than a tax on coal sales. Pet. App. 7a-8a.

The Federal Circuit acknowledged that the timing of the tax liability in *Liggett* made no practical difference: unlike the application of the SMCRA fee to coal, which varies in weight and value between extraction and sale, the tax on the tobacco remained the same whether imposed at the moment of manufacturing or when the product left the factory. Pet. App. 7a. But the court of appeals nonetheless concluded that OSM's actual practice of charging a tax based on the weight and value of the coal at sale could be ignored because the court had an obligation to construe the regulations to avoid constitutional doubt, even though OSM's regulations were unambiguous. Pet. App. 7a-9a.

REASONS FOR GRANTING THE WRIT

This Court has carefully drawn and rigorously enforced a bright line distinguishing lawful taxes imposed during manufacturing from unconstitutional taxes imposed upon sale for export. Taking care to forbid the Government's efforts to evade this foundational restriction on its taxing powers, this Court has "strictly enforced the Export Clause's prohibition against federal taxation of goods in export transit." *United States v. IBM*, 517 U.S. 843, 849 (1996).

The Federal Circuit's decision in this case represents a significant departure from that vigilance, which this Court must correct. The Government assessed a tax on the sale of exported coal – the fee is not assessed unless and until the *sale*, and the amount of the tax depends solely on the weight and value of the coal *at sale* rather than at the time of its extraction. As the lower courts both recognized, OSM previously succeeded in defending the lawfulness of this very tax scheme before the D.C. Circuit only by insisting that it had permissibly construed the SMCRA to impose a tax at the time of sale. OSM maintained that position, and uniformly imposed the tax upon sale, until this litigation. The Federal Circuit was able to deny the inevitable conclusion that the tax violates the Export Clause when applied to sales in export commerce only by overriding OSM's own longstanding position, blinking reality, and retroactively recharacterizing the tax's imposition.

Review is also warranted because the decision below provides a ready roadmap for the Government to evade the clear and strict terms of the Constitution. The Federal Circuit's methodology can readily be employed to render the Export Clause all but toothless by recharacterizing virtually any export sales tax as a deferred tax on manufacturing.

The Federal Circuit's decision equally conflicts with this Court's precedent because it turns the canon of constitutional avoidance on its head. The court of appeals converted a mechanism to *prevent* future unlawful action into a tool to *excuse* past constitutional violations.

Finally, certiorari should be granted because the court of appeals' decision gives rise to a two-to-two circuit conflict over whether the canon of constitutional avoidance takes precedence over the deference owed to an agency's settled interpretation of a statute that it implements under a direct delegation from Congress. Here, the Federal Circuit invoked the canon to reject OSM's longstanding determination to impose the tax upon the sale of exported coal. That ruling is consistent with the precedent of the Tenth Circuit, but the Second and Ninth Circuits would hold that a court has no authority to reject the agency's prior interpretation of the statute, particularly in light of the D.C. Circuit's determination to defer to OSM's interpretation in *Drummond Coal*. The circuit split implicates challenges to virtually every unconstitutional implementation of an ambiguous federal statute. This Court's intervention is accordingly required.

I. The Ruling Below Conflicts With This Court's Established Export Clause Jurisprudence In Upholding The Reclamation Fee As Applied By The Government To The Sale Of Exported Coal.

A. The Export Clause Prohibits A Tax On The Sale Of A Good For Export.

The imposition of a tax on the sale of coal bound for export violates the Constitution's Export Clause. The Constitution "categorically bars Congress from imposing any tax on exports." *United States v. United States Shoe Corp.*, 523 U.S. 360, 363 (1998). Unusual in its strictness and the vigor of its application, the Export Clause "allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit." *Id.* at 367.

This Court has long held that this prohibition precludes taxes on the sale of goods in the stream of export commerce. In *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 67 (1923), for example, the Court considered a tax on the sale of baseball bats, as applied to sales for export. The Court explained that although the Export Clause permits Congress to tax goods during manufacturing even if the goods are destined for export, "[a]rticles in course of transportation cannot be taxed." *Id.* at 69. "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant," the Court explained, so long as the goods were in the process of being exported at the time the tax was imposed. *Id.*

With respect to a sales tax, then, the "question is whether the sale was a step in exportation." *Id.* at 68. To answer that question, the Court observed, "we have to fix a point at which, in view of the purposes of the Constitution, the export must be said to begin." *Id* at 69. The Court held that the sale marks the beginning of exportation, and therefore cannot be taxed. *Id.* "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea." *Id.*

B. The Government Has Administered The Reclamation Fee As A Tax On The Sale Of Coal In Export Commerce.

1. The SMCRA directs the OSM to impose a tax to be calculated "per ton of coal produced" or as "a per centum of the value of the coal at the mine." 30 U.S.C. § 1232(a). Because the weight and value of coal predictably change between the initial extraction of raw coal and the sale of processed coal, OSM in implementing this Congressional directive was required to choose the point in time at which the tax would be imposed. OSM chose the point of sale, rendering the application of the tax in plain violation of the Export Clause. *See A.G. Spalding*, 262 U.S. at 69.

First, OSM's regulations say so unambiguously: "The fee shall be determined by the weight and value *at the time of initial bona fide sale* . . . ." 30 C.F.R. § 870.12(b) (emphasis added).

Second, OSM specifically revised its regulations to "clarify the point in time of fee determination" by reaffirming "OSM policy in effect since initial implementation of the fee collection program": that the tax was imposed on the coal at the time of sale, not extraction. 47 Fed. Reg. 28,574, 28,577 (1982). It added to the regulations the statement that the "initial bona fide sale . . . shall be determined by the first *transaction* or use of the coal by the operator." 30 C.F.R. § 870.12(b)(1) (emphasis added). The revised regulations further provided that the "[i]mpurities that have not been removed prior to the time of the *initial bona fide sale* . . . shall not be deducted from the gross weight." *Id.* § 870.12(b)(3)(i) (emphasis added). Accordingly, the regulations made clear that the tax was *not* to be based on the weight of the coal at the time of extraction; so long as impurities are removed "prior to the time of the initial bona fide sale," they do not contribute to the taxable weight of the coal. Likewise, the revised regulations provided that the weight of any water or other impurities accumulating in or added to the coal during processing between extraction and sale would be taxed. *Id.* § 870.12(b)(3)(i) (1983).[2]

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[2] The Secretary subsequently amended the regulations to allow a deduction in weight for "excess moisture," to bring the fee methodology into accord with that used by the Internal Revenue Service in assessing the Black Lung tax. *See* 53 Fed. Reg. 19718 (May 27, 1988). The Secretary did not, however, alter his position that the value of the coal will be determined as of the time of sale, and that the coal's taxable weight will not include any impurities present at the time of extraction, so long as they are removed by the time of sale. Likewise, any

Third, consistent with its treatment of the sale as the taxable event, when OSM amended the rate of the tax in 2004, it applied the new rate to coal that was subsequently sold, even if that coal had been extracted before the new rate became effective. *See* 69 Fed. Reg. 56,122, 56,127-128 (Sept. 17, 2004).

Fourth, OSM has assessed the tax only if and when a sale takes place. In those instances in which producers have stockpiled coal for later sale, the Government has neither required payment of the tax at that time, nor calculated the value and weight of the coal as of the time of extraction. *See, e.g.*, *United States v. Tri-No Enters., Inc.*, 819 F.2d 154 (7th Cir. 1987) (Government imposed tax when previously stockpiled coal was sold); *United States v. Consolidation Coal Co.*, No. 86-1001, 1987 WL 36307, at *1 (4th Cir. Jan. 30, 1987) (same); *United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 127 (N.D.W. Va. 1992) (same). The Federal Circuit did not deny OSM's actual practice, but merely recognized that under OSM's interpretation of the statute liability would arise without regard to whether a sale occurred. Pet. App. 8a.

Fifth, in *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986), the D.C. Circuit deferred to and upheld OSM's decision to tax coal according to its weight and value at the time of sale, rather than extraction. OSM cannot have it both ways, construing the statute to mean one thing when its

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impurities adhering or added after extraction will be included in the taxable weight. *See* 30 C.F.R. § 870.12(b)(3)(i).

taxing methodology is challenged as unauthorized by the statute, and the opposite when the tax so administered is challenged under the Export Clause.

C. An Unconstitutional Tax On Sales For Export Is Not Saved By Recharacterizing That Tax As A "Deferred" Manufacturing Tax.

1. The Government cannot avoid the restrictions of the Export Clause through simple verbal maneuvering. Nearly every sales tax could be characterized as a "tax on manufacturing, collected at the time of sale." If that were sufficient to evade the Export Clause, then this Court would have reached the opposite result in *A.G. Spalding*, *supra*. The sales on baseball bats could just as easily have been characterized as a tax that accrued when the baseball bats were produced but was collected when the bats were sold. To be sure, the sales tax in that case was assessed as a percentage of the sales price. But the tax would have been no less unconstitutional if imposed as a flat, one-dollar charge on every sale. This Court specified that the determinative consideration was not the formula for the amount of the tax, but rather the *timing* of its application – *i.e.*, whether the goods were in the stream of export when the tax accrued. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. at 69.

The Federal Circuit's decision thus provides a roadmap for broad-scale evasion of the Export Clause, one foreseen (and forbidden) by this Court's prior cases. The Court has warned that the "obstructions to exportation which it was the purpose [of the Clause] to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it." *United States v. Hvoslef*, 237 U.S. 1, 13 (1915). Accordingly, courts reviewing Export Clause challenges "'must regard things rather than names,' in determining whether an imposition on exports ranks as a tax." *United States Shoe Corp.*, 523 U.S. at 367 (quoting *Pace v. Burgess*, 92 U.S. 372, 376 (1876)). "The crucial question is whether the [tax] is a tax on exports in operation" as opposed to "nomenclature." *Id.* And here, there is no escaping that in operation, OSM imposed the reclamation fee as a tax on sales.

2. The Federal Circuit nonetheless purported to find precedent for its recharacterization in this Court's decision in *Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383 (1937). But that case is both doctrinally irrelevant and factually inapposite.

Liggett concerned the principle of state immunity from federal taxation, which has no textual or structural relationship to the Export Clause. The plaintiff in that case, Liggett & Myers, contended that a tax imposed upon certain tobacco products, which it sold to Massachusetts state hospitals, amounted to a "direct burden imposed upon the state." *Id.* at 386. This Court rejected that argument, finding that the tax was properly considered a "tax [ ] upon the manufacture of the tobacco," the effect of which upon the State was "indirect and imposed no prohibited burden." *Id.* The court based that conclusion principally on the fact that the "tax is laid upon each pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale." *Id.*

Liggett does not overrule this Court's unambiguous holding that the question whether a tax violates the Export Clause turns on the "taxable event" – here, the "sale" of the good. *United States v. IBM Corp.*, 517 U.S. 843, 848 (1996). The Federal Circuit's contrary decision renders this Court's precedent a nullity.

This Court has repeatedly cautioned that the "Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." *U.S. Shoe*, 523 U.S. at 368. The Court has thus rejected attempts to impose onto the Export Clause doctrines involving even the Import-Export Clause, *see id.* at 857, the Dormant Commerce Clause, *see IBM*, 517 U.S. at 851, and the Takings Clause, *see U.S. Shoe*, 523 U.S. at 368-69. If the Court has "hesitate[d] before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence," *IBM*, 517 U.S. at 857 – despite the fact that the two provisions are "textually similar," *id.* at 852, and "frequently interpreted . . . together," *id.* at 857 – it has even greater reason to resist reliance on cases implementing an implied restriction on federal burdens placed on state instrumentalities. *Cf. IBM*, 515 U.S. at 851 (concluding that the "meaning of the nontextual negative command of the dormant Commerce Clause" was uninformative of the meaning of the textual prohibition of the Export Clause). Accordingly, "decisions [that] involved constitutional provisions other than the Export Clause . . . do not govern here." *U.S. Shoe*, 523 U.S. at 368.

The structural command at issue in *Liggett* bears no relationship to the Export Clause. The central question under the Export Clause is one of *timing*: was the tax imposed on the item while it was in the export stream? The federalism question in *Liggett*, by contrast, turns on the degree and directness of the burden imposed on a state instrumentality. 299 U.S. at 386 (question is whether the tax imposed a "direct burden" on the state or instead "the effect was incidental, indirect, and [therefore] permissible").

Thus, the dispositive fact in *Liggett* – that the amount of the tax was measured as a percentage of the sale price, *id.* at 386 – is not important (much less determinative) in this challenge under the Export Clause. Because the Export Clause prohibits *any* "Tax or Duty" on exported articles, so long as the tax accrues while the item is in the export stream, it is unconstitutional no matter whether it is properly classified as a sales tax or not. *See, e.g.*, *Fairbank v. United States*, 181 U.S. 283, 283, 289-90 (1901) (flat ten-cent stamp tax on bills of lading held unconstitutional).

In any event, even if *Liggett* were useful precedent, it is factually distinguishable. The decision in *Liggett* turned critically on the fact that the tobacco tax at issue there did not depend "on the intrinsic value or price obtained upon sale." 299 U.S. at 386. But the reclamation fee in this case depends directly on the "intrinsic value" of petitioners' coal, being set at "10 per centum of the value of the coal," up to a capped amount per ton. 30 U.S.C. § 1232(a).

D. The Canon Of Constitutional Avoidance Does Not Authorize A Court To Displace An Agency's Interpretation Of The Statute Or To Ignore The Way In Which A Statute Has Actually Been Applied.

The decision below finds no more support in the canon of constitutional avoidance. In fact, the Federal Circuit's dramatic misapplication of that doctrine gives rise to a circuit conflict and provides an independent ground for certiorari.

1. The Federal Circuit erred first in invoking the canon of constitutional avoidance to construe the SMCRA in direct conflict with OSM's regulations and the agency's consistent practice.

The court of appeals did not dispute that the statutory language of the SMCRA was ambiguous as to whether the tax it imposed accrued at sale or extraction. Pet. App. 29a-30a. It acknowledged that in *Drummond Coal*, the D.C. Circuit had faced that same ambiguity and upheld OSM's regulations measuring the reclamation fee as of the time of sale. *Id.* The Federal Circuit's resort to the canon of constitutional avoidance is consistent with the precedent of the Tenth Circuit. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008).

But in direct conflict with the ruling below and the Tenth Circuit's precedent, the Second and Ninth Circuits would hold that a court of appeals does not have authority to reject OSM's reasonable interpretation of the statute. In *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008), an immigrant challenged the validity of a regulation authorizing an immigration officer to remove an alien, without holding a hearing, if the officer determined that the alien had unlawfully re-entered the country after having been previously removed. "Invoking the doctrine of constitutional avoidance," the immigrant argued that "the regulation [was] an impermissible interpretation of the statute," which should be construed to require a hearing in order to avoid a serious question under the Due Process Clause. *Id.* at 149. But the Second Circuit held that the doctrine was inapplicable. "[O]nce an ambiguous statute has been interpreted by the agency in charge of its implementation, [courts] lack the 'authority to re-construe the statute, even to avoid constitutional problems.'" *Id.* (citation omitted). In reaching this conclusion, the Second Circuit quoted and relied on the en banc Ninth Circuit's identical holding in *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (en banc).

In this case, the Secretary has, through his regulations, authoritatively interpreted the SMCRA as imposing a tax on sales. *See Drummond Coal*, 796 F.2d at 505. In these circumstances, the Second and Ninth Circuits would refuse to apply the canon of constitutional avoidance to adopt a contrary construction. As this Court squarely held in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the agency's reasonable construction of an ambiguous statute precludes a federal court from overriding that reading under principles of statutory construction.

An agency is, of course, free to change its interpretation, so long as it has a reasonable basis for the change and complies with the procedural requirements of the Administrative Procedure Act for amending its regulations. *See id.* at 981-82. But in this case OSM has not altered its regulations. It is has merely reversed course in litigation. Such strategic shifting of positions is not entitled to any deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). In such circumstances, the agency's construction is the one that must be measured against the requirements of the Constitution. *See Garcia-Villeda*, 531 F.3d at 149-50 (reviewing constitutionality of statute as construed by agency, rather than applying doctrine of constitutional avoidance); *Morales-Izquierdo*, 486 F.3d at 495-98 (same).

2. The Federal Circuit compounded its error by inexplicably applying the constitutional avoidance canon to recharacterize OSM's regulations and *conduct* as consistent with the Export Clause.

Even if the Federal Circuit had the authority to construe the SMCRA as imposing a tax on extraction rather than sale, that holding was insufficient to decide petitioners' refund claims, which turned not on any alleged facial invalidity of the statute or regulations, but rather on the fact that OSM had implemented the reclamation fee as a tax on coal export sales (whether that implementation was authorized by the statute or not). The court of appeals rejected petitioners' claim by conclusively presuming, in the name of constitutional avoidance, that OSM had in fact administered the tax in accordance with the Federal Circuit's narrowing construction of the statute, deeming irrelevant as a matter of the law the uncontested facts of OSM's actual practice. Pet. App. 7a-8a.

That decision turned the Court's constitutional avoidance canon on its head. The canon generally operates to restrict agency authority in the face of constitutional doubt. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988); Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529, 542 (2003). It is not uncommon, therefore, that when viewed in light of the Court's narrowing construction, *prior* agency action will be deemed in violation of a statute or regulation (thereby avoiding the separate constitutional challenge). For example, in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), this Court considered whether a regulation authorized the Attorney General to deny a hearing to a lawful permanent resident prior to denying him re-entry into the country. Because that construction of the regulation raised substantial due process questions, the Court construed the regulation as not permitting the denial of a hearing. *Id.* at 598-99. In light of that restrictive reading of the regulation, the Court held that the Attorney General's denial of a hearing was unlawful and awarded the petitioner relief. *Id.* at 603.

Notably, the Court in *Kwong Hai Chew* did not apply the canon of constitutional avoidance to avoid the conclusion that the Attorney General had acted illegally. The Court did not, in other words, conclude that because the regulations were properly construed to require a hearing, the Attorney General must have given one to Chew. Yet that is exactly what the court of appeals did in this case – after concluding that the statute and regulations required OSM to implement a tax on extraction rather than sales, it conclusively assumed that the tax OSM actually imposed must have conformed to that interpretation.

Although the canon of constitutional avoidance aids a court in choosing between reasonable constructions of a statute when parties seek *prospective* relief, it does not allow a court to rewrite history to conclude that an agency acted lawfully *in the past* and may accordingly retain the fruits of its unconstitutional conduct. The canon of constitutional avoidance has no application to whether OSM in fact ran afoul of the Export Clause.

3. Review is also warranted to resolve the circuit conflict over whether, under the SMCRA and OSM's implementing regulations, the tax is properly imposed upon extraction or instead upon sale of coal. Currently, different taxes would be imposed on the identical sale based on the coincidence of the court that considered the question. Although *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986), did not involve a direct challenge under the Export Clause, the central question in both that case and this is the same – whether OSM has construed and implemented the reclamation fee as a tax on extraction or sale of coal. The D.C. Circuit upheld OSM's decision to assess the tax based on the weight of coal at time of sale – including the weight of post-extraction moisture gain, and excluding the weight of pre-sale removal of impurities – only because that court accepted the Secretary's interpretation of the statute as taxing the "entire process of extracting and

selling coal." 796 F.2d at 505. In this case, the Federal Circuit looked at the same regulations and reached the opposite conclusion.

Likewise, the Fourth Circuit has addressed the same core issue, and concluded that the "critical date for the application of the" SMCRA was "not the date on which the coal was originally extracted from the ground, but the date on which the economic advantage is gained," namely, when the company "sold the coal." *United States v. Consolidation Coal Co.*, No. 86-1001, 1987 WL 36307, at *1 (4th Cir. Jan. 30, 1987) (unpublished). *See also United States v. Spring Ridge Coal Co.*, 793 F. Supp. 124, 127 (N.D.W. Va. 1992) (tax is not calculated and imposed "until [the coal] ha[s] been cleaned, processed and sold").

II. The Federal Circuit's Decision Has Nationwide Implications And Warrants This Court's Review.

Certiorari is warranted for the further reason that the ruling below has broad implications both for the administration of an important tax and for the proper application of the constitutional avoidance canon.

The constitutionality of the reclamation fee as applied to exported coal has obvious importance for an important sector of our economy, at a time when the need to improve the nation's balance of trade is paramount. *See, e.g.*, Zachary A. Goldfarb & Perry Bacon Jr., *Obama Brings Industry To Table*, WASH. POST., Jan. 22, 2011, at A1 (quoting President as explaining that "[f]or America to compete around the world, we need to export more goods around the world").

In addition, the Federal Circuit's maneuvering to avoid the plain import of this Court's cases, if left unreviewed, provides a roadmap for evasion of the Export Clause whenever the Government chooses to argue that an export sale is merely the point of deferred collection rather than the imposition of a tax. The Government has required repeated reminders from this Court of the constitutional limits on its power to tax exports. *See, e.g.*, *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363 (1998); *United States v. IBM Corp.*, 517 U.S. 843 (1996); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 67 (1923); *United States v. Hvoslef*, 237 U.S. 1, 13 (1915). The Court's lessons have once again been forgotten, and the time has come again for the Court to reestablish that the unambiguous constitutional command of the Export Clause cannot be circumvented.

Moreover, a question at the core of this case – when the reclamation tax accrues – has broad significance not only for the constitutionality of the tax as applied by OSM, but also to how the tax applies in non-export contexts. *See, e.g.*, *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986) (timing of tax affects when weight and value of coal should be measured); *United States v. Consolidation Coal Co.*, No. 86-1001, 1987 WL 36307, at *1 (4th Cir. Jan. 30, 1987) (unpublished) (timing affects taxation of reclaimed coal extracted prior to effective date of statute); *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 158 (7th Cir. 1987) (noting issue affects "economic incentive to remove otherwise abandoned (and possibly environmentally harmful) stockpiles").

Review is warranted now because of the outsized role the Federal Circuit plays in the administration of the nation's tax laws. Tax refund claims are frequently litigated in the Court of Federal Claims, over which the Federal Circuit has exclusive appellate jurisdiction. *See* 28 U.S.C. § 1295(a)(3); *see also, e.g.*, *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008); Steven L. Schooner, *The Future: Scrutinizing The Empirical Case For The Court Of Federal Claims*, 71 GEO. WASH. L. REV. 714, 720 (2003) (noting that "[a]pproximately one-quarter of the cases before the Court [of Federal Claims] involve tax refund suits") (citation omitted).

Finally, the Federal Circuit's application of the canon of constitutional avoidance – in conflict with the decisions of this Court and other circuits – has broad implications far beyond this particular taxation scheme. Its assertion of authority to displace an agency's construction of an ambiguous federal statute in the name of constitutional avoidance applies to any statute, including the immigration provisions addressed by the Second and Ninth Circuits. Significantly, although the Federal Circuit exercised that power in this case to save an otherwise unconstitutional statute, in other cases the doctrine could be used to overturn an entirely reasonable agency construction that, in the end, *would* withstand constitutional scrutiny. *See, e.g.*, *Morales-Izquierdo*, 486 F.3d at 504-05 (Thompson, J., dissenting) (arguing that majority should have applied canon of constitutional avoidance to adopt a more alien-friendly interpretation of statute even if regulation was otherwise reasonable and would not violate the Constitution). At the same time, the Federal Circuit's inversion of the canon to counter-factually presume that OSM had administered the reclamation tax in accordance with the court's saving construction creates a model for immunizing clearly unconstitutional agency action whenever the Government is alleged to have violated the Constitution in the course of administering an arguably ambiguous federal statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 9, 2011

APPENDIX

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APPENDIX A

United States Court of Appeals,
Federal Circuit.

CONSOLIDATION COAL COMPANY, Consol of Pennsylvania Coal Company, Consol of Kentucky Inc., Eighty Four Mining Company, Helvetia Coal Company, Island Creek Coal Company, Kent Coal Mining Company, Keystone Coal Mining Corporation, Laurel Run Mining Company, McElroy Coal Company, Nineveh Coal Company, Quarto Mining Company, Eagle Energy, Inc., Elk Run Coal Company, Inc., Goals Coal Company, Green Valley Coal Company, Independence Coal Company, Inc., Knox Creek Coal Corporation, Marfork Coal Company, Inc., Martin County Coal Corporation, Peerless Eagle Coal Company, Performance Coal Company, Rawl Sales & Processing Company, Sidney Coal Company, Inc., Stone Mining Company, Jim Walter Resources, Inc., Eastern Associated Coal Corporation, Kingston Resources, Inc., Pioneer Fuel Corporation, Powder River Coal Company, Apogee Coal Company, Arch Western Resources, LLC, Conyon Fuel Company, LLC, Catenary Coal Company, Coal-Mac, Inc., Dal-Tex Coal Corporation, Hobet Mining, Inc., Mingo Logan Coal Company, Payter Branch Mining, Inc., Plateau Mining Corporation, Rag Cumberland Resources, L.P., Rag Emerald Resources, L.P., Twentymile Coal Company, Coastal Coal Company, LLC, Coastal Coal-West Virginia, LLC, Evergreen Mining Company, Mid-Vol Leasing, Inc., Mountaineer Coal Development Company, Old Ben Coal Company, Shipyard River Coal Terminal Company, Riverside Energy, Inc., Virginia Crews Coal Company,

Clintwood Elkhorn Mining Company, Gatliff Coal
Company, Premier Elkhorn Coal Company, Perry
County Coal Corporation, Glamorgan Coal Company,
LLC, Terry Eagle, L.P., Nicholas-Clay Land &
Mineral, Inc., Nicholas-Clay Company, LLC, Andalex
Resources, Inc., Genwal Resources, Inc., Pacific Coast
Coal Company, Usibelli Coal Mine, Inc., West Ridge
Resources, Inc., United States Steel Mining Company,
LLC and Covenant Coal Corporation, Plaintiffs-
Appellants,
and
Wellmore Energy Company, LLC (formerly known as
Rapoca Energy Company, LLC), Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

No. 2009-5083.
Aug. 2, 2010.
Rehearing and Rehearing En Banc Denied Oct. 12,
2010.

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Todd M. Hughes, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Tony West, Assistant Attorney General, Jeanne E.

Davidson, Director, and Tara K. Hogan, Trial Attorney. Of counsel was Daniel W. Kilduff, Office of the Solicitor, Department of the Interior, of Washington, DC.

Before LOURIE, FRIEDMAN, and MOORE, Circuit Judges.

MOORE, Circuit Judge.

The appellants in this case, a group of operators in the coal mining industry, appeal from the United States Court of Federal Claims' grant of summary judgment that certain regulations that implement the Surface Mining Control and Reclamation Act of 1977 (SMCRA) reclamation fee do not violate the Export Clause of the Constitution. We affirm.

BACKGROUND

This is the third opinion we have issued in this long-pending case. We explained the factual background in our previous opinion. *See Consolidation Coal Co. v. United States,* 351 F.3d 1374 (Fed.Cir.2003) (*Consol I*). Following our remand in *Consol I,* the Court of Federal Claims granted summary judgment in favor of the plaintiff coal producers on the issue of liability. *Consolidation Coal Co. v. United States,* 64 Fed.Cl. 718 (2005) (*Consol II*). We reversed on June 11, 2008, holding that the statutory fee was on "coal extracted" rather than "coal sold" and thus not an unconstitutional tax on exports. *Consolidation Coal Co. v. United States,* 528 F.3d 1344 (Fed.Cir.2008) (*Consol III*). On remand, the appellants (Consol, collectively) argued that *Consol III* only determined the constitutionality of the statute and separately argued the constitutionality of the implementing regulations. The Court of Federal Claims disagreed with the appellants that *Consol III* did not decide the constitutionality of the regulations and entered summary judgment in favor of the government on March 4, 2009. *Consolidation Coal Co. v. United States,* 86 Fed.Cl. 384 (2009) (*Consol IV*). This appeal followed.

DISCUSSION

We review the Court of Federal Claims' grant of summary judgment and determinations of our scope of remand without deference. *Old Stone Corp. v. United States,* 450 F.3d 1360, 1367 (Fed.Cir.2006); *Laitram Corp. v. NEC Corp.,* 115 F.3d 947, 950 (Fed.Cir.1997). Summary judgment is appropriate when, drawing all justifiable inferences in the nonmovant's favor, there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* (1986). We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

In *Consol IV,* the Court of Federal Claims determined that "the Federal Circuit [in *Consol III*] already addressed and resolved the constitutionality of both the reclamation fee statute and its implementing regulations." *Consol IV,* 86 Fed.Cl. at 389. It held that because we determined that "coal produced" in the statute means "coal extracted," then the phrase must have the same definition in the regulations. *Id.* It pointed to the fact that our opinion in *Consol III* discussed the "application" of the statute and the "method" by which OSM collects fees. *Id.* The Court of Federal Claims stated that this showed that we explicitly considered both the statutes and the implementing regulations.

The Court of Federal Claims also found that even if we did not reach the issue explicitly in *Consol III*, we determined the issue by "necessary implication." *Int'l Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353 (Fed.Cir.2008) (holding that remand to determine a substantive issue necessarily decided a related procedural issue). The Court of Federal Claims held that because we found the statute constitutional in *Consol III* in spite of Consol's arguments there regarding the regulations, Consol cannot now be heard on the constitutionality of the regulations.

On appeal, Appellants argue that the Court of Federal Claims erred in determining that our decision in *Consol III* determined the constitutionality of the regulations at issue. They point to the *Consol III* opinion that states "the only question before this court is one of statutory interpretation of 30 U.S.C. § 1232(a)." *Consol III*, 528 F.3d at 1347.

The government responds that the Court of Federal Claims was correct; we considered the "application" of the statute and the "method" of collecting the reclamation fee; this is the equivalent of considering the implementing regulations. It also points out that in *Consol III* we cited the regulation in question as part of our analysis. *See id.* at 1347.

We will address directly the parties' arguments regarding the constitutionality of the implementing regulations. In *Consol III*, we held that the doctrine of constitutional avoidance required us to construe the phrase "coal produced" in 30 U.S.C. § 1232(a) to mean "coal extracted." *Id.* at 1348. Appellants argue that although this definition applies to the statute, the regulations implemented by the Office of Surface Mining apply the fee to coal sold. As an example, appellants point to 30 C.F.R. § 870.12(a)-(b)(3)(iii) which states in pertinent part:

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

Appellants argue that because OSM collects the reclamation fee at the time of sale, it is necessarily a tax on "coal sold" rather than "coal extracted" regardless of the meaning of the term in the statute.

On the other hand, the government argues that liability under SMCRA incurs at the time of extraction; the collection of the fee is merely delayed until the time of sale, when operators typically weigh coal. The government argues that the time of collection cannot convert a constitutional tax or fee to an unconstitutional one, citing *Liggett & Myers Tobacco Co. v. United States,* 299 U.S. 383 (1937). In *Liggett,* the taxpayer was a manufacturer of tobacco and disputed a tax based on weight that applied to its product at the time of sale or removal from the factory. *Id.* at 385. Liggett sold the tobacco in question to the Commonwealth of Massachusetts for use at a state hospital. *Id.* Liggett and the Commonwealth argued that any tax on the sale amounted to an improper imposition of a tax on the

Commonwealth. *Id.* The Court held that this was not a tax on sale, but a proper tax on manufacture. *Id.* at 386. Although the statute delayed the collection of the tax from the time of manufacture to the time of sale or removal from the factory, this did not make it unconstitutional. *Id.* The Court found that the timing of the tax "mitigate[s] the burden" on manufacturers and "indicates no purpose to impose the tax upon ... sale." *Id.*

Appellants respond that *Liggett* is not applicable because the coal extracted is not the same product that the operators later sell. They argue that between extraction and sale, certain impurities like oil and antifreeze may accumulate,[1] while the operators remove other materials like dirt and rock that come along with coal as extracted. Although the extracted coal along with dirt and rock may be heavier-and thus subject to a higher fee-the appellants argue that this is the proper basis for the reclamation fee. The appellants also argue that this is a tax on sale rather than extraction because coal that an operator never sells will never be subject to the fee.[2]

Appellants' arguments in this appeal regarding the language of the regulation are much the same as those made in *Consol III.* Using the same canon of construction, the doctrine of constitutional avoidance, we hold that the regulations implementing SMCRA do not violate the Export Clause. *See Edward J. DeBartolo Corp. v. Fla. Gulf Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988). The regulations, like the statute, use the term "coal produced," and we conclude that this term in the regulation must be construed consistent with the identical term in the statute. "Coal produced" applies to "coal extracted" rather than "coal sold."

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[1] 30 C.F.R. § 870.18 allows for deduction for excess moisture accumulated between extraction and sale.

[2] Our decision in *Consol III* addresses appellants' alternative arguments regarding *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C.Cir.1986). *Consol III,* 528 F.3d at 1347.

The decision by OSM to delay collection of the reclamation fee to the time of sale simply "mitigate[s] the burden" on operators by not requiring the installation and use of weighing equipment at the time of extraction. Appellants' arguments regarding the change in weight between extraction and sale are not persuasive. In *Liggett,* the Court did not differentiate between an organic product like tobacco that could change weight and other products that could not. We see no reason to do so here.[3] The liability incurs at the time of extraction, and OSM merely collects the fee at the time of sale. The practice of stockpiling-holding product that never sells-should not change the result. If an operator extracts coal, but chooses not to sell it, it still incurs liability; the stockpiling simply creates a collection issue for OSM.

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[3] The government persuasively argues that the weight at the time of sale, without dirt and rocks, is a more accurate representation of the amount of "coal extracted" than if the operators took the weight at the time of extraction. We agree that it would appear contrary to our decision in *Consol III* to levy a fee on dirt and rocks as part of "coal extracted."

We hold that all of OSM's challenged regulations for collecting the reclamation fee under SMCRA, like the statute itself, apply to "coal extracted" and do not violate the Export Clause.

AFFIRMED

APPENDIX B

United States Court of Federal Claims.
CONSOLIDATION COAL COMPANY, et al.,
Plaintiffs,
v.
The UNITED STATES, Defendant.
Wellmore Energy Co., LLC, Plaintiff,
v.
The United States, Defendant.

Nos. 01-254C, 01-442C.
March 4, 2009.

Steven H. Becker, New York City, attorney of record for Consolidation Coal Company, et al, and Paul A. Horowitz, Charles H. Critchlow, and Suzanne I. Offerman, of counsel. John Y. Merrell, Jr., McLean, Virginia, attorney of record for Wellmore Energy Co., LLC.

Tara K. Hogan, Department of Justice, Washington, D.C., with whom was Assistant Attorney General Gregory G. Katsas, for Defendant. Jeanne E. Davidson, Director, Todd M. Hughes, Deputy Director, and Daniel W. Kilduff, of counsel, Department of the Interior.

OPINION & ORDER

FUTEY, Judge.

This case comes before the Court on the parties' cross motions for summary judgment following a remand from the United States Court of Appeals for the Federal Circuit. Plaintiffs are operators of coal mining operations. Pursuant to Title IV of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") and its implementing regulations, plaintiffs paid a reclamation fee on coal, some of which was exported to foreign customers. Throughout this lengthy litigation, plaintiffs have maintained that the reclamation fee, as applied to exports, violates the Export Clause of the United States Constitution. In their instant motion, notwithstanding the Federal Circuit's finding that the reclamation fee is constitutional, plaintiffs assert that the regulations through which the fees are imposed violate the Export Clause. Specifically, plaintiffs contend that the Federal Circuit did not resolve the constitutionality of the regulatory scheme and that the D.C. Circuit's decision in *Drummond Coal Co. v. Hodel,* confirms that the reclamation fee regulations violate the Export Clause. 796 F.2d 503 (D.C.Cir.1986). Plaintiffs request that this Court grant their motion for summary judgment on the issue of liability and issue a new money judgment in Jim Walter Resources' favor.

Defendant conversely asserts that the Federal Circuit's Opinion fully disposed of the case and mandates dismissal by this Court. In the alternative, defendant contends that the reclamation fee regulations do not violate the Export Clause; that even if the regulations were unconstitutional, plaintiffs would remain obligated to pay reclamation fees pursuant to statute; and that plaintiffs' argument amounts to a rulemaking challenge over which this Court lacks jurisdiction. Defendant requests that this Court grant its motion for summary judgment and dismiss plaintiffs' claims.

Presently before the Court are: Plaintiffs' Post-Remand Motion For Summary Judgment, Defendant's Response In Opposition To Plaintiffs' Post-Remand Motion For Summary Judgment And Cross-Motion For Summary Judgment; Plaintiffs' Reply Brief In Support Of Post-Remand Motion For Summary Judgment And Brief In Opposition To Defendant's Cross-Motion For Summary Judgment; Defendant's Reply To Plaintiffs' Response To Defendant's Cross-Motion For Summary Judgment; and Defendant's Supplemental Appendix. The Court held oral argument on the motions for summary judgment on February 3, 2009.

1. *Background*[1]

In 1977, Congress enacted the SMCRA to protect the population and the environment from the possible negative side effects of surface coal mining. *See* 30 U.S.C. § 1202(a) (2009). Congress determined that the burden of restoring the mining lands should be borne by the coal industry. H.R. REP. NO. 218, at 136 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 668. In order to accomplish this goal, Congress established the Abandoned Mine Reclamation Fund ("Fund"), a trust fund used for the purpose of restoring various natural resources that had been damaged due to mining. 30 U.S.C. § 1231(a), (c)-(d) (2009). The Fund primarily derives revenue from an exaction imposed upon "coal produced." *Id.* § 1232(a) (2009); 30 C.F.R. § 870.12(a) (2009).

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[1] The facts were discussed in detail in the Court's Opinion granting defendant's motion to dismiss, *Consolidation Coal Co. v. United States*, 54 Fed.Cl. 14, 15-16 (2002) ("*Consolidation I*"); in the Federal Circuit's decision, *Consolidation Coal Co. v. United States*, 351 F.3d 1374, 1376-77 (Fed.Cir.2003); and in the Court's Opinion granting plaintiffs' motion for summary judgment, *Consolidation Coal Co. v. United States*, 64 Fed.Cl. 718, 720-22 (2005) ("*Consolidation II*"). Undisputed factual assertions are repeated herein and supplemented where necessary to provide factual information pertinent to this Opinion.

Specifically, the SMCRA provides:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less....

30 U.S.C. § 1232(a) (2001).[2] The Secretary of the Interior ("Secretary") subsequently promulgated regulations implementing the reclamation fee, pursuant to its authority under 30 U.S.C. § 1211(c)(2) (2009) (giving the Secretary the power to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this chapter."). The regulations provide that "[t]he operator shall pay a reclamation fee on each ton of

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[2] The current version of the SMCRA provides for a reclamation fee of 31.5 cents per ton of coal produced by surface mining and 13.5 cents per ton of coal produced by underground mining. *See* 30 U.S.C. § 1232(a).

coal produced for sale, transfer, or use...." 30 C.F.R. § 870.12(a). Additionally, "[t]he fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." *Id.* § 870.12(b). Finally, "[t]he weight of each ton shall be determined by the actual gross weight of the coal," including "[i]mpurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator." *Id.* § 870.12(b)(3)(i).

In accordance with the SMCRA and its implementing regulations, plaintiffs paid reclamation fees on coal, some of which was sold to foreign customers. On April 27, 2001, Consolidation Coal Company brought suit in the United States Court of Federal Claims alleging that the reclamation fee, as applied to coal for export, violated the Export Clause of the United States Constitution.[3]

a. *Consolidation I*

On August 14, 2002, the Court dismissed plaintiffs' complaint for lack of subject matter jurisdiction. The SMCRA specifically provides that the United States District Court for the District of Columbia has jurisdiction over challenges to regulations promulgated pursuant to the SMCRA, and that petitions "shall be filed ... within sixty days from the date of such action [by the Secretary], or after such date if the petition is based solely on grounds arising after the sixtieth day." 30 U.S.C. § 1276(a)(1)(2009). Because plaintiffs were challenging the implementing regulations, the Court determined that it lacked jurisdiction to hear plaintiffs' claims. The United States Court of Appeals for the Federal Circuit, however, reversed the Court's decision on appeal, and remanded the case for further proceedings. The Federal Circuit found that "the Export Clause provides the coal producers with an independent self-executing cause of action that allows for Tucker Act jurisdiction in the Court of Federal Claims." *Consolidation Coal Co.,* 351 F.3d at 1379. Moreover, because Congress did not unambiguously withdraw Tucker Act jurisdiction over constitutional challenges to the reclamation fee regulation, the Court could properly hear plaintiffs' claims. *See Id.* at 1380-81.

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[3] Plaintiffs initially asserted a claim under the Takings Clause as well; however, that claim was subsequently withdrawn.

b. ***Consolidation II***

Following the Federal Circuit's remand, the Court granted plaintiffs' first motion for summary judgment on April 4, 2005, finding that imposition of the reclamation fee on coal for export violated the Export Clause. The crucial inquiry was whether the fee on "coal produced" is imposed solely upon extraction of the coal, or upon the extraction and sale of the coal. *See Consolidation II,* 64 Fed.Cl. at 724. If imposed upon extraction alone, the fee is constitutional; if imposed upon the extraction and sale of coal, however, the fee is unconstitutional. *Id.* The Court considered both the reclamation fee statute and regulations, and ultimately relied on the D.C. Circuit's finding in *Drummond,* that the term "production" under the SMCRA "could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door." 796 F.2d at 505. The Court therefore concluded that the term "coal produced" as used in the statute and regulations is not confined to extraction and, because the fee is imposed at the time of sale, it violates the Export Clause. *Consolidation II,* 64 Fed.Cl. at 726-27.

On June 11, 2008, the Federal Circuit reversed the Court's finding that "application of the [SMCRA] reclamation fee to export sales of coal violates the Export Clause of the Constitution." *Consolidation Coal Co. v. United States,* 528 F.3d 1344, 1346 (2008). The Federal Circuit agreed with the Court that if the reclamation fee is imposed upon extraction alone, it is constitutional; whereas, if it is imposed upon extraction and sale, it is unconstitutional in violation of the Export Clause. *Id.* at 1347. Nevertheless, the Federal Circuit relied upon the canon of constitutional avoidance to preserve the constitutionality of the reclamation fee. The court examined both the SMCRA and its implementing regulations, and found that the meaning of the term "coal produced" in the SMCRA is ambiguous, that it "can reasonably be interpreted to mean 'coal extracted,' and that such an interpretation avoids a potential violation of the Export Clause." *Id.* That interpretation therefore prevailed. *Id.* at 1348. The Federal Circuit consequently reversed the Court's grant of summary judgment, and remanded the case to the Court for "proceedings consistent with this opinion." *Id.*

Upon resumption of proceedings before the Court, plaintiffs insisted upon filing a renewed motion for summary judgment. The policy of the Court is not to reject a request by a party to file pleadings regarding a potentially pending legal issue; plaintiffs filed their Post-Remand Motion for Summary Judgment with the Court on September 3, 2008.

2. *Discussion*

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Jay v. Sec'y of Dep't of Health & Human Servs.*, 998 F.2d 979, 982 (Fed.Cir.1993). A fact is material if it might significantly affect the outcome of the suit under the governing law. *Anderson,* 477 U.S. at 248. The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). If the moving party demonstrates an absence of a genuine issue of material fact, the burden then shifts to the non-moving party to show that a genuine issue exists. *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.,* 833 F.2d 1560, 1562-63 (Fed.Cir.1987). Alternatively, if the moving party can show that there is an absence of evidence to support the non-moving party's case, then the burden shifts to the nonmoving party to proffer such evidence. *Celotex,* 477 U.S. at 325. The court must resolve any doubts about factual issues in favor of the party opposing summary judgment, to whom the benefits of all favorable inferences and presumptions run. *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.,* 755 F.2d 158, 163 (Fed.Cir.1985); *H.F. Allen Orchards v. United*

States, 749 F.2d 1571, 1574 (Fed.Cir.1984).

The fact that both parties have moved for summary judgment does not relieve the court of its responsibility to determine the appropriateness of each party's motion. *Prineville Sawmill Co., Inc. v. United States*, 859 F.2d 905, 911 (Fed.Cir.1988) (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed.Cir.1987)). A cross-motion is a party's claim that it alone is entitled to summary judgment. *A Olympic Forwarder, Inc. v. United States*, 33 Fed.Cl. 514, 518 (1995). Therefore, it does not follow that if one motion is rejected, the other is necessarily supported. *Id.* Rather, the court must evaluate each party's motion on its own merit and resolve all reasonable inferences against the party whose motion is under consideration. *Id.* (citing *Corman v. United States*, 26 Cl.Ct. 1011, 1014 (1992)).

Plaintiffs' pending motion for summary judgment is premised upon their allegation that the Federal Circuit "left open for resolution by this Court on remand[ ] the question of whether [Department of Interior's Office of Surface Mining Reclamation and Enforcement ('OSM')]'s *administration* of the statute, through its regulations, imposes the reclamation fee on coal extracted *and sold*, and thus violates the Export Clause when applied to export sales of coal." Pls.' Br. in Supp. of Post-Remand Mot. for Summ. J. at 2 (emphasis in original). Plaintiffs assert that the issue of constitutionality of the regulations is distinct from that of the constitutionality of the statute, and further contend that the reclamation fee regulations are unconstitutional as applied to exports. *Id.* at 4. Specifically, plaintiffs argue that *Drummond* confirms that the regulations interpret the term "coal produced" to mean both the extraction and sale of coal, and that the application of the reclamation fee through the regulations therefore violates the Export Clause. *Id.* at 3. Defendant, on the other hand, asserts that the Federal Circuit's decision disposes of all plaintiffs' statutory and regulatory claims, and that plaintiffs' complaint must consequently be dismissed.

a. *Applicability of Drummond*

Plaintiffs' primary argument is based on the D.C. Circuit's decision in *Drummond. See* 796 F.2d 503. Plaintiffs assert that *Drummond* confirms that OSM's regulations interpret the term "coal produced" as encompassing both the extraction and sale of coal, and plaintiffs argue that this Court should find the same. Nevertheless, plaintiffs unsuccessfully advanced the same argument in their first motion for summary judgment.

In *Drummond*, the plaintiff challenged a revision to the reclamation fee regulation; the challenged revision resulted in the inclusion of excess moisture in the gross weight of the coal upon which the reclamation fee was assessed. *See id.* at 504; *see also* 30 C.F.R. § 870.12(b)(3)(i) (1985). The plaintiff argued that the regulation exceeded the Secretary's statutory authority because the term "coal produced" as used in the statute was limited to mean "coal extracted," and therefore did not encompass moisture added to the coal post-extraction. *Id.* Both the district court and the D.C. Circuit, however, found the term "coal produced" to be ambiguous. *Id.* at 505; *Drummond Coal Co. v. Hodel*, 610 F.Supp. 1489, 1497

(D.D.C.1985). The Court of Appeals consequently determined that the Secretary's regulation was owed deference in the absence of a showing of contrary Congressional intent. *Id.* Significantly, the Court of Appeals refrained from affirmatively defining the term "coal produced." *See Id.*

For the purposes of the issue presently before the Court, *Drummond* is inapposite. The Federal Circuit has specifically stated that the *Drummond* decision is not relevant to "[t]he issue of the constitutionality of the reclamation fee as applied to exports." *Consolidation Coal Co.*, 528 F.3d at 1347. Moreover, the Federal Circuit determined that the term "coal produced" in the SMCRA means "coal extracted." *Id.* at 1348. Therefore, Plaintiffs' continued reliance on *Drummond* to invalidate the reclamation fee regulations as unconstitutional is misplaced.

b. *Effect of the Federal Circuit's Decision*

In its decision of June 11, 2008, the Federal Circuit found that the SMCRA reclamation fee is constitutional. More specifically, the court held that the meaning of the term "coal produced" is limited to mean "coal extracted." *Id.* The same, pivotal term is used in the statute, which assesses the fee, as well as in the regulations, which address when the fee is collected; the Federal Circuit examined both the statute and the regulations to determine the meaning of the term. *See id.* at 1347. Defendant avers that the Federal Circuit's emphasis on the use of the term in the regulations and statute confirms that its construction of the term applies to both. *See* Def.'s Resp. in Opp'n to Pls.' Post-Remand Mot. for Summ. J. & Cross-Mot. for Summ. J. at 5. Plaintiffs counter this claim, asserting that the Federal Circuit's construction of the term "coal produced" is limited to the use of that term in the statute, and that the meaning of the term in the regulations is separate and distinct. Pls.' Reply Br. at 1; Pls.' Br. in Supp. of Post-Remand Mot. for Summ. J. at 14. Nonetheless, during oral argument, plaintiffs conceded that the term "coal produced" means the same thing in the statute and its implementing regulations. Tr. at 12:18-22. Plaintiffs went on to argue that the issue of the definition is a "red herring," however, and that the real issue is the nature and operation of the regulations. Tr. at 11:3-4; 13:18-20.

Plaintiffs additionally contend that the Federal Circuit's decision in *Nufarm America's, Inc. v. United States*, stands for the proposition that the constitutionality of a statute and its regulations are to be considered separately. Pls.' Reply Br. at 1-2; *see* 521 F.3d 1366 (Fed.Cir.2008). In *Nufarm*, the plaintiff challenged a regulation as violating the Export Clause. *See* 521 F.3d 1366. The *Nufarm* plaintiff never challenged the constitutionality of the statute; consequently, neither the trial court nor the court of appeals considered it, and the plaintiff was subsequently permitted to raise the issue. *See Id.* Plaintiffs here contend that, like in *Nufarm*, the Federal Circuit considered only the constitutionality of the statute, and that this Court may therefore consider the constitutionality of the regulations separately on remand. Nevertheless, the facts here are easily distinguishable from those in *Nufarm*. Throughout this litigation, plaintiffs' claim has involved a challenge to the constitutionality of both the statute and the regulations; in *Nufarm*, the constitutionality of the statute was never at issue. Furthermore, this Court's prior decision in *Consolidation II* considered both the statute and the regulations, as did plaintiffs' briefs before the Federal Circuit, and the Federal Circuit's Opinion. Thus, *Nufarm* is inapplicable here.

Moreover, the Court agrees with defendant that the Federal Circuit already addressed and resolved the constitutionality of both the reclamation fee statute and its implementing regulations. In its Opinion, the Federal Circuit expressly states that it "adopt[s] the reasonable construction that as applied to the SMCRA reclamation fee 'coal produced' is limited to 'coal extracted.'" *Consolidation Coal Co.*, 528 F.3d at 1348. The SMCRA reclamation fee is the subject of both the statute and the regulations; this language plainly applies to both. The Federal Circuit further clarifies its consideration of the regulatory scheme by discussing this Court's summary judgment opinion, which it is directly reviewing, as ruling that "*the method* by which the Office of Surface Mining Reclamation and Enforcement (OSM) collects its reclamation fee violates the Export Clause of the Constitution." *Id.* at 1346 (emphasis added). Finally, the Federal Circuit explicitly reverses this Court's finding that the "*application of* the [SMCRA] reclamation fee to export sales of coal violates the Export Clause of the Constitution." *Id.* (emphasis added). Plaintiffs allege that the Federal Circuit failed to address "the question of whether OSM's *administration* of the statute, through its regulations ... violates the Export Clause when applied to export sales of coal." Pls.' Br. in Supp. of Post-Remand Mot. for Summ. J. at 2. The Federal Circuit was, however, clear that it was not only addressing the statute assessing the reclamation fee, but also the method by which the reclamation fee is collected: through OSM's regulations.

The Federal Circuit's decision in *Int'l Rectifier Corp. v. IXYS Corp.*, similarly confirms this finding. *See* 515 F.3d 1353 (Fed.Cir.2008). In *Int'l Rectifier*, the plaintiff attempted to raise a procedural issue on appeal that it had argued in a previous appeal in the same case. Notwithstanding the court's failure to explicitly address the issue in its earlier opinion, the court concluded that it had "necessarily rejected" the plaintiff's arguments as to that issue. *Id.* at 1360 (citing *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed.Cir.1998)) ("[I]n some cases issues not explicitly addressed by an appellate court may nonetheless be decided by necessary implication."). The court explained that its earlier mandate as to other claims in the case implicitly required the district court to treat the contested issue the same way. *Id.* at 1360. The court also noted specifically that the contested issue was raised in both parties' briefs during the last appeal. *Id.* Plaintiffs here attempt to distinguish *Int'l Rectifier* by arguing that the trial court's consideration of the claims on remand there necessitated a decision on the procedural issue, which plaintiffs claim is not the case here. Tr. at 30:14-20. Nonetheless, plaintiffs' reading of *Int'l Rectifier* is inaccurate. The critical factor in *Int'l Rectifier* was that the parties had fully briefed and argued the issue before the court. Likewise here, plaintiffs' briefs on appeal addressed both the regulations and the statute. This Court's prior decision fully considered the regulations and the statute. *See Consolidation II,* 64 Fed.Cl. at 719, 721, 726. Most significantly, the Federal Circuit acknowledged its consideration of the regulations in its Opinion. Therefore, the Federal Circuit's Opinion fully disposed of plaintiffs' statutory and regulatory claims. The Court need not address the parties' remaining arguments, and defendant is entitled to summary judgment in its favor.

3. *Conclusion*

For the foregoing reasons, Plaintiffs' Post-Remand Motion For Summary Judgment is DENIED, and Defendant's Cross-Motion For Summary Judgment is ALLOWED. Accordingly, this case is hereby DISMISSED. The Clerk shall act accordingly. No costs.

IT IS SO ORDERED.

APPENDIX C

United States Court of Appeals,
Federal Circuit.

CONSOLIDATION COAL COMPANY, Consol of Pennsylvania Coal Company, Consol of Kentucky Inc., Eighty Four Mining Company, Helvetia Coal Company, Island Creek Coal Company, Kent Coal Mining Company, Keystone Coal Mining Corporation, Laurel Run Mining Company, McElroy Coal Company, Nineveh Coal Company, Quarto Mining Company, Eagle Energy, Inc., Elk Run Coal Company, Inc., Goals Coal Company, Green Valley Coal Company, Independence Coal Company, Inc., Knox Creek Coal Corporation, Marfork Coal Company, Inc., Martin County Coal Corporation, Peerless Eagle Coal Company, Performance Coal Company, Rawl Sales & Processing Company, Sidney Coal Company, Inc., Stone Mining Company, Apogee Coal Company, Arch Western Resources, LLC, Canyon Fuel Company, LLC, Catenary Coal Company, Coal-Mac, Co., Dal-Tex Coal Corporation, Hobet Mining, Inc., Mingo Logan Coal Co., Kingston Resources, Inc., Paynter Branch Mining, Inc., Pioneer Fuel Corporation, Plateau Mining Corporation, Rag Cumberland Resources, L.P., Rag Emerald Resources, L.P., Twentymile Coal Company, Coastal Coal Company, LLC., Coastal Coal-West Virginia, LLC, Eastern Associated Coal Corporation, Evergreen Mining Company, Mid-Vol Leasing, Inc., Mountaineer Coal Development Company, Old Ben Coal Company, Shipyard River Coal Terminal Company, Riverside Energy, Inc., Virginia Crews Coal Company, Clintwood Elkhorn Mining Company, Gatliff Coal Company, Premier

Elkhorn Coal Company, Perry County Coal
Corporation, Glamorgan Coal Company, LLC, Terry
Eagle L.P., Nicholas-Clay Land & Mineral, Inc.,
Nicholas-Clay Company, LLC, and Alex Resources,
Inc., Genwal Resources, Inc., Pacific Coast Coal
Company, Usibelli Coal Mine, Inc., Powder River Coal
Company, West Ridge Resources, Inc., United States
Steel Mining Company, LLC, Covenant Coal
Corporation, and Rapoca Energy Company, LLC (now
known as Wellmore Energy Company, LLC),
Plaintiffs,
and
Jim Walter Resources, Inc., Plaintiff-Appellee,
v.
UNITED STATES, Defendant-Appellant.

No. 2007-5108.
June 11, 2008.

Before NEWMAN, PROST, and MOORE, Circuit Judges.

MOORE, Circuit Judge.

Appellant United States appeals from the United States Court of Federal Claims's grant of summary judgment that application of the Surface Mining Control and Reclamations Act of 1977 (SMCRA) reclamation fee to export sales of coal violates the Export Clause of the Constitution. We reverse and remand.

BACKGROUND

This case reaches us after a long history, including a previous appeal to this court. The factual background was explained in our prior opinion and will not be repeated here. *See Consolidation Coal Co. v. United States,* 351 F.3d 1374 (Fed.Cir.2003). Following our remand in *Consolidation Coal,* the Court of Federal Claims granted summary judgment in favor of the plaintiff coal producers on the issue of liability. *Consolidation Coal Co. v. United States,* 64 Fed.Cl. 718 (2005). The court ruled that, as applied to coal that is exported, the method by which the Office of Surface Mining Reclamation and Enforcement (OSM) collects its reclamation fee violates the Export Clause of the Constitution.[1] The coal producers moved for judgment in favor of Jim Walter Resources (JWR), who is one of five test plaintiffs. On February 22, 2007, the court entered judgment in favor of JWR. This appeal followed.

DISCUSSION

We review the Court of Federal Claims's grant of summary judgment without deference. *Old Stone Corp. v. United States,* 450 F.3d 1360, 1367 (Fed.Cir.2006). "Statutory interpretation is a question of law that we review *de novo.*" *Wesleyan Co. v. Harvey,* 454 F.3d 1375, 1378 (Fed.Cir.2006). The only question before this court is one of statutory interpretation of 30 U.S.C. § 1232(a). Pursuant to the statute, the reclamation fee is imposed upon "coal produced" in the United States:

> All operators of coal mining operations ...

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[1] The Export Clause provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5.

> shall pay ... a reclamation fee of 35 cents per ton of *coal produced* by surface mining and 15 cents per ton of *coal produced* by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary....

30 U.S.C. § 1232(a) (emphases added). Neither the statute nor OSM's regulations specifically define the term "coal produced." OSM's regulations provide:

> (a) The operator shall pay a reclamation fee on each ton of *coal produced* for sale, transfer, or use, including the products of in situ mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

30 C.F.R. § 870.12 (emphasis added). If "coal produced" in § 1232(a) refers solely to coal extracted then the disputed portion of the statute does not render the statute unconstitutional under the Export Clause. If, however, "coal produced" is interpreted to include the entire process of extracting and selling coal-if it is a tax on extraction *and* sale-then, as it applies to sales that occur in the export process, it is an unconstitutional violation of the Export Clause.

Where a possible construction of a statute would render the statute unconstitutional, courts must construe the statute "to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Bldg & Constr. Trades Council,* 485 U.S. 568, 575 (1988). This canon of constitutional avoidance is subject only to the qualification that the interpretation that "save[s] a statute from unconstitutionality" must be reasonable-that is, the saving construction must not be "plainly contrary to the intent of Congress." *Id.* at 575. "The elementary rule is that every reasonable construction must be resorted to, in order to save the statute from unconstitutionality." *Id.* (quoting *Hooper v. California,* 155 U.S. 648, 657 (1895)).

Both sides agree the reclamation fee would be constitutional if imposed solely on coal extracted. We agree with the government that "coal produced" in § 1232(a) can reasonably be interpreted to mean "coal extracted," and that this interpretation avoids a potential violation of the Export Clause. JWR argues that in *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C.Cir.1986) this same statutory language "coal produced" was interpreted as including both the extraction and sale of coal. In *Drummond,* however, the D.C. Circuit was not interpreting the statute in light of the potential conflict with the Export Clause. The issue of the constitutionality of the reclamation fee as applied to exports simply was not raised. *Id.* at 503-08. Moreover, the *Drummond* court did not conclude that the language of the statute mandated the construction, but rather it held that the statute was ambiguous: "Like the district court, we do not find the ordinary meaning of that term unambiguous: 'Production could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction.'" *Id.* at 505. *Drummond* involved the validity of a government regulation that directed that in calculating the tax on the gross weight of coal after it had been mined but before sale, the gross weight included impurities such as water that had not been removed. The court did not itself independently determine the meaning of the statutory term "coal produced," but instead gave *Chevron* deference to the regulatory definition of that term, which included water as part of the "coal produced." 796 F.2d at 507. In the present case, in contrast, the sole question is whether, in determining if the statute violates the constitutional prohibition of export taxes, "coal produced" properly is defined as "coal extracted." The government asserted that the plain meaning of the statute is that "coal produced" is to be interpreted as "coal extracted." Even if we were to assume that the statute is ambiguous as to the meaning of "coal produced," the government's construction must still prevail as it is the only reasonable construction which preserves the constitutionality of the statute.

JWR also argues that the position taken by the government in this case, that "coal produced" is limited to "coal extracted," is inconsistent with the position the government took in *Drummond*. Although the government disputes the argument that it has taken inconsistent positions, either way, the government's interpretation of "coal produced" in this case must prevail. Neither the government, nor this court, are bound by any contrary assertions by the government regarding the statutory interpretation of "coal produced" where the canon of constitutional avoidance mandates that we adopt the reasonable construction that as applied to the SMCRA reclamation fee "coal produced" is limited to "coal extracted."

For the foregoing reasons, we reverse the grant of summary judgment and remand for proceedings consistent with this opinion.

REVERSED and REMANDED

APPENDIX D

United States Court of Federal Claims.

CONSOLIDATION COAL COMPANY, et al.,
Plaintiffs,
v.
The UNITED STATES, Defendant.
Rapoca Energy Company, LLC, Plaintiff,
v.
The United States, Defendant.

Nos. 01-254C, 01-442C.April 4, 2005.

Attorneys and Law Firms

Steven Harlan Becker, New York, N.Y., attorney of record for plaintiff Consolidation Coal Company, et al.

John Y. Merrell, Jr., McLean, Virginia, attorney of record for plaintiff Rapaco Energy Company.

Luke Paul Levasseur, Department of Justice, Washington, D.C., with whom was Assistant Attorney General Peter D. Keisler, for defendant. David M. Cohen, Director, and Jeanne E. Davidson, Deputy Director.

John Smathers, Department of the Interior, of counsel.

OPINION AND ORDER

FUTEY, Judge.

This case comes before the court on plaintiffs' motion for summary judgment following a remand from the United States Court of Appeals for the Federal Circuit (Federal Circuit). Defendant opposes plaintiffs' motion and renews its motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs are producers and exporters of coal. Pursuant to Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and implementing regulations, plaintiffs paid a reclamation fee on coal which was exported to foreign customers. Plaintiffs maintain that the reclamation fee, as applied to exports, runs afoul of the Export Clause. Specifically, plaintiffs maintain that the reclamation fee is a tax impermissibly levied on the sale of coal after it has entered the stream of export. Plaintiffs contend that defendant's Commerce Clause argument is foreclosed by numerous court holdings which concluded that the reclamation fee is a tax. Defendant, on the other hand, asserts that the reclamation fee does not implicate the Export Clause as it is imposed pre-export on the production of coal. Defendant also contends that the reclamation fee is a valid exercise of Congress' power under the Commerce Clause.

Factual Background[1]

In 1977, Congress enacted the SMCRA to protect the population and the environment from the possible negative side effects of surface coal mining. 30 U.S.C. § 1202(a). Title V, 30 U.S.C. §§ 1251-79, is directed toward "controll[ing] coal mining's present and future environmental harms." *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 157 (7th Cir.1987) (noting that "Title V imposes an obligation on operators of surface coal mining operations to control the environmental harm their operations may cause"). On the other hand, Title IV, 30 U.S.C. §§ 1231-43, harbors the reclamation fee provisions and targets abandoned as well as unreclaimed mines. *Id.* (explaining that Title IV was intended to "correct the environmental harm caused by past coal mining").

Congress determined that the burden for paying for the restoration of mining lands should be borne by the coal industry and, in turn, the consumers of coal. H.R. REP. NO. 218, at 136 (1997), reprinted in 1977 U.S.C.C.A.N. 593, 668. In order to accomplish this goal, Congress established the Abandoned Mine Reclamation Fund (Fund), a trust fund used for the purpose of restoring various natural resources that had been damaged due to mining. 30 U.S.C. § 1231(a), (c) & (d). The Fund primarily derives revenue from an exaction imposed upon "coal produced." *Id.* § 1232(a); 30 C.F.R. § 870.12(a).

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[1] The facts were discussed in detail in the court's opinion granting defendant's motion to dismiss, *Consolidation Coal Co., et al. v. United States*, 54 Fed.Cl. 14, 15-16 (2002), and in the Federal Circuit's decision, *Consolidation Coal Co., et al. v. United States*, 351 F.3d 1374, 1376-77 (Fed.Cir.2003). The undisputed factual assertions are repeated herein and supplemented where necessary to provide factual information pertinent to this opinion.

Specifically, the SMCRA provides, in pertinent part:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.

30 U.S.C. § 1232(a). The level of the fee reflected a compromise between several principal considerations: balancing the burden on the industry against the inflationary impact on the economy. H.R. REP. NO. 218, at 137, reprinted in 1977 U.S.C.C.A.N. 593, 669. It was to be set at a level which would not "'constrain the development or production' of coal," but at the same time would "generate sufficient revenue to fund the Abandoned Mine Program." *Drummond Coal Co. v. Hodel*, 610 F.Supp. 1489, 1499 (D.D.C.1985) (citing H.R. REP. NO. 218, at 136 (1997), reprinted in 1977

U.S.C.C.A.N. 593, 668). The Fund's unappropriated balance is approximately $2 billion.

The Secretary of the Interior (Secretary) was given ultimate authority to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [the Act]." 30 U.S.C. § 1211(c)(2). The extent of the Secretary's broad authority is illuminated in 30 U.S.C. § 1242(a), which empowers the Secretary "to engage in any work and to do all things necessary or expedient, including promulgation of rules and regulations, to implement and administer the provisions of this subchapter." In other words, the Secretary possessed the authority to enforce the SMCRA as well as to fill-in any gaps through rules and regulations.

Consistent with the SMCRA's mandate, the Secretary subsequently promulgated implementing regulations. The reclamation fee is to be paid "on each ton of coal produced for sale, transfer, or use ...." 30 C.F.R. § 870.12(a). The fee is "determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." *Id.* § 870.12(b). Further, "[t]he weight of each ton shall be determined by the actual gross weight of the coal." *Id.* § 870.12(b)(3). The regulations also indicate the extent to which weight deductions are permissible: "Impurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator, excluding excess moisture for which a reduction has been taken pursuant to § 870.18, shall not be deducted from the gross weight." *Id.* § 870.12(b)(3)(i).

Certain record-keeping requirements were incorporated into the regulatory framework. Coal producers "selling coal on a clean coal basis [were required to] retain records that show run-of-mine tonnage, and the basis for the clean coal transaction." *Id.* § 870.12(b)(3)(ii). Failure to maintain sufficient records "subject[ed] the operator to fees based on raw tonnage data." *Id.* § 870.12(b)(3)(iii). In addition, the regulations mandated that:

> (a) Any person engaging in or conducting a surface coal mining operation shall maintain, on a current basis, records that contain at least the following information:
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> (1) Tons of coal produced, bought, sold or transferred, amount received per ton, name of person to whom sold or transferred, and the date of each sale or transfer.
>
> (2) Tons of coal used by the operator and date of consumption.
>
> (3) Tons of coal stockpiled or inventoried which are not classified as sold for fee computation purposes under § 870.12.
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> 30 C.F.R. § 870.16(a)(1)-(a)(3).

In accordance with the SMCRA and implementing regulations, plaintiffs paid reclamation fees on coal which was sold to foreign customers. On April 27, 2001, Consolidation Coal Company brought suit in this court alleging that the reclamation fee violated the Takings Clause and the Export Clause.[2] Rapoca Energy Company filed its complaint on July 31, 2001, relying upon the same constitutional provisions as Consolidation Coal Company. The two cases were consolidated on November 6, 2001.

Following extensive briefing, the court dismissed plaintiffs' complaint on August 14, 2002, for lack of subject matter jurisdiction. The court first reasoned that plaintiffs' constitutional claims were subject to statute of limitations constraints. *Consolidation Coal Co., et al. v. United States*, 54 Fed.Cl. 14, 17 (2002). Next, relying on *Amerikohl Mining, Inc. v. United States*, 899 F.2d 1210 (Fed.Cir.1990) and 30 U.S.C. § 1276(a)(1), the court concluded that jurisdiction over plaintiffs' challenge rested exclusively with the United States District Court for the District of Columbia (D.C. District Court) because plaintiffs were challenging the substance of the regulations. *Consolidation Coal*, 54 Fed.Cl. at 19. Plaintiffs appealed the court's decision to the Federal Circuit. On December 11, 2003, the Federal Circuit held that the Export Clause provided an independent self-executing cause of action within the court's jurisdiction and that Congress did not unambiguously withdraw Tucker Act jurisdiction in

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[2] On February 14, 2005, plaintiffs represented at oral argument, in response to an inquiry from the court, that they were no longer pursuing their Takings claim in this action. Transcript of Oral Argument (Tr.) at 6; see also Plaintiffs' Motion For Summary Judgment (Plaintiffs' Mot.) at 2 n. 2; Plaintiffs' Reply Brief In Support Of Their Motion For Summary Judgment And Response To Defendant's Renewed Motion To Dismiss Plaintiffs' Claims at 4 n. 1.

30 U.S.C. § 1276(a)(1). *Consolidation Coal Co., et al. v. United States,* 351 F.3d 1374, 1376-77 (Fed.Cir.2003). The case was, therefore, remanded to the court for further proceedings.

On May 21, 2004, plaintiffs filed their Motion For Summary Judgment. On July 9, 2004, defendant responded by opposing plaintiffs' motion and by renewing its motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs filed their response and reply on September 17, 2004. Subsequently, on September 30, 2004, plaintiffs filed a supplemental brief discussing proposed new rules pertaining to the reclamation fee. Defendant replied on December 2, 2004. The court heard oral argument on February 14, 2005.

Discussion

Plaintiffs have moved for summary judgment contending that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Jay v. Sec'y, DHHS,* 998 F.2d 979, 982 (Fed.Cir.1993). A fact is material if it might significantly affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248. The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). If the moving party demonstrates an absence of a genuine issue of material fact, the burden then shifts to the non-moving party to show that a genuine issue exists. *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833

F.2d 1560, 1563 (Fed.Cir.1987). Alternatively, if the moving party can show there is an absence of evidence to support the non-moving party's case, then the burden shifts to the non-moving party to proffer such evidence. Celotex, 477 U.S. at 325. The court must resolve any doubts about factual issues in favor of the party opposing summary judgment, *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed.Cir.1985), to whom the benefits of all favorable inferences and presumptions run. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed.Cir.1984).

Defendant opposes plaintiffs' summary judgment motion by renewing its motion to dismiss for failure to state a claim upon which relief can be granted.3[3] The court will grant a RCFC 12(b)(6) motion only if it appears beyond a doubt that plaintiffs have failed to allege facts sufficient to support their claim. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Mostowy v. United States,* 966 F.2d 668, 672 (Fed.Cir.1992). In ruling on a RCFC 12(b)(6) motion to dismiss, the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to plaintiffs. *Papasan v. Allain,* 478 U.S. 265, 283 (1986) (citing *Scheuer v. Rhodes,* 416 U.S. 232, 2363 (1974); *Gould, Inc. v. United States,* 935 F.2d 1271, 1274 (Fed.Cir.1991)). Nevertheless, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss."

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[3] The Federal Circuit expressly indicated that its opinion did not encompass defendant's motion to dismiss for failure to state a claim. *Consolidation Coal,* 351 F.3d at 1377 n. 3.

Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir.1981), *aff'd,* 460 U.S. 325 (1983). "[L]egal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *Blaze Constr., Inc. v. United States,* 27 Fed.Cl. 646, 650 (1993) (internal quotations omitted).

The Export Clause of the United States Constitution unequivocally provides that "[n]o Tax or Duty shall be laid on articles exported from any state."[4] This constitutional proscription has consistently been afforded a broad construction to "prohibit[ ] Congress from laying any tax or duty on exports." *United States v. IBM,* 517 U.S. 843, 852 (1996); *United States v. United States Shoe Corp.,* 523 U.S. 360, 367 (1998) (interpreting *IBM* to stand for the proposition that "the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit"); *Fairbank v. United States,* 181 U.S. 283, 290 (1901) ("The requirement of the Constitution is that exports should be free from any government burden."); *Ranger Fuel Corp. v. United States,* 33 F.Supp.2d 466, 469 (E.D.Va.1998) (acknowledging the Export Clause's "blanket prohibition"). The United States Supreme Court (Supreme Court) in *U.S. Shoe* noted the true reach of the Export Clause's prohibition: "*IBM* plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." *U.S. Shoe,* 523 U.S. at 368.

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[4] U.S. CONST. art. I, § 9, cl. 5.

The Export Clause's breadth also finds support in debates during the Constitutional Convention of 1787. For instance, an amendment was proposed which would have inserted the phrase "for the purpose of revenue" after the word "duty." Such an amendment would have curtailed the clause's reach, however, it was defeated by a count of eight to three. *Pace v. Burgess,* 92 U.S. 372, 372 (1875) (citing Madison Debates, p. 456); see also *IBM,* 517 U.S. at 859-60; *Fairbank,* 181 U.S. at 292-93. In addition, the delegates rejected an amendment which would have allowed taxation of exports contingent upon approval by two-thirds of both houses. *United States Shoe Corp. v. United States,* 907 F.Supp. 408, 19 C.I.T. 1284, 1288-89 (1995) (citing Note, *Constitutionality of Export Controls,* 76 YALE L.J. 200, 203 (1966)).[5] Although the government has on numerous occasions urged the Supreme Court to adopt a narrow interpretation of the Framers' original intent, the government's argument to that effect in *IBM* was explicitly rejected. The Supreme Court explained that "[t]he better reading [of the Framers' intent], that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all." IBM, 517 U.S. at 861.

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[5] See also Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause?: Making Sense of United States v. United States Shoe Corp.,* 84 MINN. L. REV. 129, 143-44 (Nov.1999); Erik A. Jensen, *The Export Clause,* 6 FLA. TAX REV. 1, 6-15 (2003).

The Export Clause's prohibition extends beyond the direct taxation of articles in export to "services and activities closely related to the export process." *Id.* at 846. For example, the Supreme Court has held that a tax on a foreign bill of lading was in substance a tax on the articles themselves. *Fairbank,* 181 U.S. at 293. The same analysis was applied to a tax on ship charters in *United States v. Hvoslef,* 237 U.S. 1, 17 (1915). Further, in both *Thames* and *IBM,* the Supreme Court held that a tax on insurance premiums violated the Export Clause. *Thames & Mersey Marine Ins. Co. v. United States,* 237 U.S. 19, 27 (1915); *IBM,* 517 U.S. at 862. The Supreme Court also held, albeit under an Import-Export Clause analysis, that requiring an importer to obtain a license was a tax on imports. *Brown v. Maryland,* 12 Wheat. 419, 25 U.S. 419, 4448 (1827).

Most important to the inquiry at hand, however, are the court holdings recognizing that a tax on the sale of an article is the equivalent to a tax on the article; provided, of course, the sale occurs in the export process. In *A.G. Spalding & Bros. v. Edwards,* a tax on the sale of baseball products was invalidated where "the sale was a step in exportation ...." *A.G. Spalding & Bros. v. Edwards,* 262 U.S. 66, 68 (1923); see also *Willcuts v. Bunn,* 282 U.S. 216, 228 (1931) ("A tax on the sale of an article, imported only for sale, is a tax on the article itself.") (citing *Brown,* 25 U.S. at 444). Likewise, in *Ranger Fuel,* a tax on the sale of coal which was used to finance the Black Lung Disability Trust Fund was deemed to be a violation of the Export Clause. *Ranger Fuel,* 33 F.Supp.2d at 469. Therefore, a tax on the sale of an article does not fall into the category of "various services and activities only tangentially related to the export process" which could permissibly be taxed. *IBM*, 517 U.S. at 850.

Despite the Export Clause's broad reach, several well-defined exceptions have been carved out. The first such exception was articulated in *Cornell v. Coyne*, which upheld a tax on the manufacture of filled cheese bound for export. *Cornell v. Coyne*, 192 U.S. 418, 427 (1904). The Supreme Court provided the following rationale in support thereof:

> The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation.

Id. Approximately two decades before *Cornell*, this exception was discussed in *Turpin v. Burgess*, 117 U.S. 504 (1886). *Turpin* involved the same stamp tax on tobacco bound for export as was discussed in *Pace v. Burgess*, 92 U.S. 372 (1875). In *Turpin*, the stamp tax was left undisturbed because "the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation ...." *Turpin*, 117 U.S. at 507.

The second exception involves the so-called user fee. In *U.S. Shoe*, the Supreme Court applied the "time-tested decision in *Pace*" in determining what constitutes a user fee. *U.S. Shoe*, 523 U.S. at 369. The Supreme Court explained that the Export Clause "does not rule out a 'user fee,' provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for Government-supplied services, facilities, or benefits." *Id.* at 363 (citing *Pace*, 92 U.S. at 375-76). Distinguishing between a duty and "compensation given for services [in fact] rendered," the Supreme Court defined a valid user fee as one that "correlate[s] reliably with the ... services used or usable by the exporter," *id.*, or "fairly match[es] the exporters' use of ... services and facilities." *Id.* at 370. Accordingly, a user fee properly calibrated to account for services rendered could survive Export Clause scrutiny.

Acts of Congress are entitled to a presumption of constitutionality. *Fairbanks*, 181 U.S. at 283; *Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir.1967). The burden of demonstrating that a statute is unconstitutional falls on the party challenging its validity. *Moon*, 379 F.2d at 391. In the Export Clause context, a tax is to be afforded its "common [ ] and usually expansive [ ] meaning ...." *IBM*, 517 U.S. at 858 (footnote omitted). The Supreme Court has also instructed that the inquiry should "regard things rather than names," *Fairbank*, 181 U.S. at 304, and that it is the court's task "to guard against ... the imposition of a[tax] under the pretext of fixing a fee." *U.S. Shoe*, 523 U.S. at 370 (quoting *Pace*, 92 U.S. at 376). With these factors in mind, the court turns to the merits of the case.

At this juncture, two preliminary observations which narrow the scope of the court's inquiry are warranted. First, defendant expressly disavowed any reliance on the argument that the reclamation fee constitutes a user fee.[6] Second, defendant concedes that the sale of coal occurs in the export process.[7] Despite these concessions, several key issues still remain unresolved. The court must initially discern the precise moment the reclamation fee is imposed. Both sides agree that the fee would be constitutional if imposed solely on extraction, which would be the equivalent of the manufacturing stage in *Cornell,* 192 U.S. at 427. On the other hand, given defendant's concession that the sale occurs in the export process, the fee, if held to be a tax, would be unconstitutional pursuant to *A.G. Spalding* if imposed at the time the coal is sold. *A.G. Spalding,* 262 U.S. at 68. Next, assuming the fee is imposed at the time of sale, the court's analysis shifts and descends into an assessment of the relationship between Export Clause and Commerce Clause jurisprudence. The court must address whether the Commerce Clause overrides the Export Clause and, if so, whether the reclamation fee is a permissible exercise of Congress' Commerce Clause power.

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[6] Defendant's Reply Memorandum In Support Of Its Renewed Motion To Dismiss Plaintiffs' Claims And In Opposition To Plaintiffs' Motion For Summary Judgment at 6; see also Tr. at 22.

[7] Compare Plaintiffs' Proposed Findings Of Uncontroverted Fact ¶ 24 with Defendant's Responses And Objections To Plaintiffs' Renewed Proposed Findings Of Uncontroverted Fact ¶ 24; see also Defendant's Renewed Motion To Dismiss Plaintiffs' Claims And Opposition To Plaintiffs' Motion For Summary Judgment (Def.'s Mot.) at 30 n. 10.

1. *When is the reclamation fee imposed?*

Defendant maintains that while the fee may be calculated at the time of the sale, it is actually based on "coal produced" at the mine. Stated another way, defendant contends that the reclamation fee is assessed on the amount of coal extracted from the ground. Defendant avers that if Congress intended to impose a sales tax it could have employed the same language (i.e., coal sold) it used in the Black Lung Excise Tax.[8] In addition, defendant asserts that the reclamation fee is analogous to the tax on the manufacture of filled cheese upheld in *Cornell*, 192 U.S. at 427. Defendant avers, on the basis of *Cornell* and its progeny, that the production of an item is separate and distinct from its sale. Defendant also relies on SMCRA record-keeping regulations to support its position. Further, defendant advances a separation of powers argument. Defendant also maintains that plaintiffs' argument is premised on the regulations promulgated by the Secretary and not on the SMCRA's statutory language. In sum, defendant maintains that "nothing suggests that the activities occurring at the time the fee is calculated should be understood as creating the underlying liability for that fee."[9]

Plaintiffs contend that the reclamation fee is imposed at the time of sale and is calculated on the amount of coal sold. Plaintiffs aver, however, that the reclamation fee is not a sales tax per se; rather, they advocate a subtle distinction-that the reclamation fee is a tax which burdens the sale of coal. Plaintiffs maintain that the reclamation fee is not based on the amount of coal extracted because an obligation to pay the fee does not arise until the coal is sold. Plaintiffs assert that they could stockpile coal indefinitely without incurring any liability to pay the reclamation fee. Further, plaintiffs rely heavily on the *Drummond Coal* decisions to support their position. Plaintiffs also argue that the record-keeping regulations merely serve a "control function" and do not establish that the reclamation fee is based on the amount of coal extracted. Plaintiffs aver that no separation of powers issue is present in this case.

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[8] 26 U.S.C. § 4121.

[9] Def.'s Mot. at 22.

At the outset, defendant argues that "the statute says coal produced ... [a]nd coal produced is clearly distinguishable from a sales tax. Congress knows how to do a sales tax. It did it in the Black Lung Excise Tax ... [a]nd we think the case really ... should be that straightfoward."[10] While defendant's argument is superficially appealing, the problem with that argument is that Congress also knows how to use the term "extraction." In fact, it did so in the Black Lung Excise Tax, the very statutory provision relied upon by defendant. 26 U.S.C. § 4121(d)(1) (memorializing the phrases "[c]oal extracted" and "coal is extracted"). Accordingly, the court does not find the linguistic differences between the SMCRA and the Black Lung Excise Tax controlling and returns to the term "coal produced."

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[10] Tr. at 53.

Both parties agree that the reclamation fee is imposed upon the amount of "coal produced" as described in 30 U.S.C. § 1232(a). Defendant maintains that "[a]lthough the statute does not define 'produc[tion]' in a separate provision, no such definition is necessary, as it is clear from SMCRA's purpose and legislative history, as well as from common sense, what 'produc[tion]' means in this context."[11] Defendant's statement is only partially accurate. Defendant's proposition is correct only to the extent it recognizes that the term "coal produced" was not specifically defined in the statute. *Drummond Coal Co. v. Hodel,* 796 F.2d 503, 507 (D.C.Cir.1986) (explaining that "Congress did not explicitly address the proper meaning of the words 'coal produced' in either the statutory language or the legislative history"). The remainder of defendant's position is directly contradicted by the *Drummond Coal* decisions.

In *Drummond Coal,* the Secretary promulgated regulations which taxed impurities in the coal which had not been removed prior to sale. *Drummond Coal,* 610 F.Supp. at 1493 (quoting 30 C.F.R. § 870.12(b)(3)(i) (1982)). The plaintiff in *Drummond Coal* alleged that the Secretary did not possess the authority to tax excess moisture which accumulated on the coal after it was extracted from the ground. *Id.* To ascertain the limits of the Secretary's authority, the D.C. District Court was required to interpret the phrase "coal produced;" the same term at issue in this case. The D.C. District Court undertook an extensive analysis of the term:

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[11] Def.'s Mot. at 18.

> 30 U.S.C. § 1232 states that a reclamation fee of 35 cents per ton of "coal *produced* by surface coal mining" shall be levied on all coal operators. Emphasis added. The term "produced" is ambiguous. "Production" could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction. The latter interpretation would support the conclusion that impurities added after extraction, such as moisture, should not be taxed. The former interpretation would imply that the gross product sold to the buyer- even if it contains impurities and moisture- should serve as the basis for taxation.

Id. at 1497. After concluding that the term "coal produced" was ambiguous, the D.C. District Court held that "[t]he 1982 revised regulations adopt the first of the two possible interpretations of section 1232." *Id.* at 1498. Accordingly, the D.C. District Court declined to equate the term "coal produc [tion]" with extraction and upheld the regulations.

Subsequently, the plaintiff appealed to the United States Court of Appeals for the District of Columbia (D.C.Circuit) and again advanced a "plain meaning" argument to support his position. *Drummond Coal,* 796 F.2d at 505. The D.C. Circuit, for all practical purposes, adopted the D.C. District Court's reasoning and rejected the plaintiff's argument:

> Congress ... did not define "coal" in the statute- still less the term "coal produced," upon which the fee is levied. Like the district court, we do not find the ordinary meaning of that term unambiguous: " 'Production' could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction .... [N]owhere does the [SMCRA] specify what elements compromise a 'taxable' piece of coal.

Id. (quoting 610 F.Supp. at 1497). The D.C. Circuit concluded its opinion as follows: "We do not say that the Secretary is or was forbidden to adopt Drummond's suggested definition of 'coal produced.' Rather, we hold that because Congress had no specific intention on this point, the Secretary, under *Chevron,* had the authority to fashion a reasonable interpretation. This the Secretary has done." *Id.* at 508. Therefore, the D.C. Circuit deferred to the Secretary's interpretation and upheld his authority to include excess moisture which was not present at the time of extraction in the reclamation fee calculation.

The decisions in *Drummond Coal* are significant in several respects. First, the decisions undermine defendant's argument that the term "coal produced" is unambiguous in light of the SMCRA's "legislative history" and "common sense." *Drummond Coal,* 796 F.2d at 505, 507. Second, the decisions conflict with defendant's assertion that "coal produc[tion]" is limited to extraction. Defendant attempts to evade this second conclusion by arguing that the D.C. Circuit did not adopt the D.C. District Court's holding that "production" "include[s] the entire process of extracting and selling coal, complete from pit to buyer's door ...." *Id.* at 505 (quoting 610 F.Supp. at 1497). Defendant is mistaken. The D.C. Circuit, in its *Chevron* analysis, concluded that the Secretary had the authority to fashion, and did fashion, a reasonable interpretation of the SMCRA. *Id.* at 508. The reasonable interpretation referenced and endorsed in the D.C. Circuit's opinion was the District Court's conclusion that "[t]he 1982 revised regulations adopt the first of the two possible interpretations of section 1232." *Drummond Coal,* 610 F.Supp. at 1492.

Third, the *Drummond Coal* decisions also implicitly refute defendant's argument that production is limited to extraction. If, as defendant argues, coal production included only extraction, the Secretary would not have had the power to include excess moisture in the reclamation fee calculation.[12] The Secretary's authority would have ceased at extraction and could not have extended beyond that point to include excess moisture which accumulated after the extraction process ended.[13] In other words,

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[12] Excess moisture is by definition moisture which accumulates after coal is extracted from the ground. Drummond Coal, 796 F.2d at 504 n. 2.

[13] Notably, at the time of the *Drummond Coal* decisions, taxation would not have been limited to excess moisture. Oil treatment, antifreeze, and post-extraction debris would also have been included in the reclamation fee calculation. Tr. at 76.

Drummond Coal would have been decided differently had the court adopted the position that production was synonymous with extraction. In rejecting the plaintiff's argument, the D.C. Circuit allowed excess moisture to be included in the calculation because the Secretary's authority transcended the extraction process and extended "from pit to buyer's door." *Drummond Coal,* 796 F.2d at 505 (quoting 610 F.Supp. at 1497). Accordingly, the court concludes that the term "coal produced" is not confined to extraction.

The court next turns to examine the exact time at which the reclamation fee is imposed. Plaintiffs maintain that the reclamation fee is imposed at the time the coal is sold. Defendant, on the other hand, contends that the fee is only calculated at the time of sale. The court agrees with plaintiffs. As an initial matter, the *Drummond Coal* decisions touch upon this aspect of the analysis. As mentioned above, both parties agree that the reclamation fee is imposed upon "coal produced." Having concluded that the term "coal produced" encompasses "the entire process of extracting and selling coal, complete from pit to buyer's door," *id.* (quoting 610 F.Supp. at 1497), the reclamation fee necessarily burdens the sale of coal. Nevertheless, the court proceeds with the analysis to pinpoint the reclamation fee's imposition.

A coal producer is permitted to stockpile coal without incurring any obligation to pay the reclamation fee. In *Consolidation Coal,* the government acknowledged that it "does not now claim, and never has claimed, that an operator which mines coal ... and places that coal in a coal stockpile prior to sale, should pay a reclamation fee ... on that coal." *United States v. Consolidation Coal Co.*, No. 82-1077, slip op. at 3 (S.D.W.Va. Nov. 7, 1985). While defendant criticizes plaintiffs' "stockpiling" argument as "hypothetical[ ]" whereas "Interior's regulations ... are based on real-world situations,"[14] plaintiffs' argument is not as far-fetched as defendant suggests.

In *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 157 (7th Cir.1987), the plaintiff sold coal which was retrieved from stockpiles on his land. *Tri-No*, 819 F.2d at 156. The government attempted to collect the reclamation fee, but the plaintiff refused to pay. *Id.* The plaintiff argued that assessing a reclamation fee on coal removed from stockpiles removed any incentive to eliminate stockpiles and could lead to additional environmental harm. *Id.* at 157. Although the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) found the plaintiff liable, it noted the following: "Arguably, Title IV's language may defeat Congress' purpose by reducing or eliminating the economic incentive to remove otherwise abandoned (and possibly environmentally harmful) stockpiles. If so, Congress, not this court, will determine if the statute needs adjustment." *Id.* In other words, the Seventh Circuit acknowledged the legitimacy of plaintiffs' position that the reclamation fee does not attach to stockpiled coal.

The above analysis, therefore, begs the question-when is the reclamation fee imposed? Several courts have touched upon the issue; although their holdings are not binding on the court, it does find their reasoning persuasive. The United States District Court for the Northern District of West Virginia addressed a coal producer's "legitimate concerns about the possibility of having the reclamation fee twice imposed upon the coal recovered from the gob piles." *United States v. Spring Ridge Coal Co.,* 793 F.Supp. 124, 127 (N.D.W.Va.1992). Stated another way, the coal producer argued that a reclamation fee may already have been paid on the coal in the gob pile. The District Court did not accept the coal producer's position because "coal from the gob piles would not be assessed a reclamation fee until it had been cleaned, processed, and sold." *Id.* Thus, the possibility of double-billing was minimized because the fee was not assessed until the coal was sold.

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[14] Def.'s Mot. at 27 n.9.

In *Consolidation Coal,* the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) interpreted the SMCRA in a similar manner by affirming the District Court's interpretation of "the [SMCRA] as imposing a reclamation fee on 'those *who* gain an economic benefit from the coal *when* they gain the advantage.' " *United States v. Consolidation Coal Co.,* 1987 WL 36307, at *1 (4th Cir.1987) (unpublished opinion). The Fourth Circuit elaborated: "[t]he critical date for application of the [SMCRA] is therefore not the date on which the coal was originally extracted from the ground, but the date on which the economic advantage is gained." *Id.* The Fourth Circuit upheld the District Court's conclusion that the coal producer had "derived the economic advantage when it sold the coal ...." *Id.* Therefore, the

Fourth Circuit's decision in *Consolidation Coal* corroborates the conclusion reached in *Spring Ridge Coal* that the reclamation fee is imposed at the time the coal is sold.

In sum, the reclamation fee does not fit into the *Cornell* mold, but rather is analogous to *A.G. Spalding* and *Ranger Fuel,* as it is imposed upon the sale of coal and burdens that event. The term "coal produced" extends beyond mere extraction and includes "the entire process of extracting and selling coal, complete from pit to buyer's door." *Drummond Coal,* 796 F.2d at 505 (quoting 610 F.Supp. at 1497). No obligation to pay the reclamation fee comes into existence until the coal is sold. The SMCRA has been interpreted as "impos[ing]" or "assess[ing]" the reclamation fee at the time the coal is sold. *Spring Ridge Coal,* 793 F.Supp. at 127; *Consolidation Coal,* 1987 WL 36307, at *1. The court's task, however, is far from over. Given that defendant does not dispute that the sale of coal takes place at a point in time when the coal is already in the stream of export, and that the case law has equated a tax on the sale of an item with a tax on the actual item itself, the court must ascertain the reclamation fee's operative character. Defendant argues that despite the timing of the reclamation fee's imposition, it should nevertheless be upheld as a valid exercise of Congress' Commerce Clause power.

II. *Commerce Clause v. Export Clause*

The first issue the court must resolve is whether the Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.,* 452 U.S. 264

(1981) upheld the SMCRA's enactment as a constitutional exercise of Congress' Commerce Clause power.[15] Defendant asserts *Hodel* is binding precedent which conclusively established that the SMCRA, in its entirety, is constitutional. Defendant contends that the Supreme Court's conclusion in *Hodel* was premised on Congress' findings in Title I of the SMCRA, which concluded that coal mining operations adversely affect interstate commerce. Defendant maintains that Congress' findings indiscriminately apply to the entire Act. A close examination of both the District Court's and the Supreme Court's opinion, however, reveals that the Supreme Court's opinion did not encompass Title IV of the SMCRA.

At an initial glance, the question presented in *Hodel* was whether the SMCRA's enactment was a valid exercise of Congress' Commerce Clause power. Hodel, 452 U.S. at 268. After reviewing Congress' findings, the Supreme Court determined that "Congress rationally determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity." *Id.* at 281. In a footnote, however, the Supreme Court acknowledged that the District Court's decision to deny declaratory relief as to Title IV had not been appealed. *Id.* at 273 n. 9. Stated another way, the constitutionality of Title IV was not an issue which was before the Supreme Court and any decision as to Title IV would have transcended the proper scope of the appeal.

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[15] The Commerce Clause provides "Congress shall have Power ... [t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

Defendant also cannot find any solace in the District Court's opinion, the text of which makes clear that the basis for denying declaratory relief regarding Title IV was not an endorsement of constitutionality. The District Court explained that "the thrust of [the plaintiffs'] challenge has been directed particularly to the constitutionality of Title V of the act ...." *Virginia Surface Mining and Reclamation Ass'n, Inc., v. Andrus,* 483 F.Supp. 425, 429 (W.D.Va.1980). The District Court further elaborated:

> Very little, if any, challenge has been mounted to the provisions for abandoned mine reclamation. The issues involved in plaintiffs' challenge to Title V, although similar in certain respects, are clearly separable from the issues involved in plaintiffs' challenge to Title IV. Likewise, the provisions of each title are such that constitutional questions regarding one do not of necessity implicate the other.

Id. The District Court noted that the individual provisions were severable and that it possessed the authority "to deny declaratory relief as to any matter which the court finds not to be clearly articulated." *Id.* The District Court concluded that declaratory relief should be denied because "questions concerning Title V of the act [are] capable of resolution without regard to Title IV, and ... challenges to the latter [are] less than clearly presented ...." *Id.* One must ponder whether the District Court would have taken the great pains it did to bifurcate its analysis of Title V from Title IV if the analysis of the former simply subsumed the analysis of the latter. Accordingly, the constitutionality of Title IV was not a matter which was addressed in either the District Court's or the Supreme Court's opinion.[16]

The parties next dispute whether legislation purportedly enacted under Congress' Commerce Clause power should be subjected in appropriate circumstances to an Export Clause analysis. Not surprisingly, the parties adopt diametrically opposed and extreme positions. Defendant avers that the Export Clause is not as absolute as plaintiffs read it. Defendant maintains that regulatory legislation under the Commerce Clause is "immune from scrutiny under the Export Clause."[17] Defendant contends that the imposition of a fee on exports should be upheld against an Export Clause challenge provided the fee is part of a regulatory scheme. Plaintiffs, on the other hand, contend that the Export Clause prohibits any burden irrespective of whether it is intended to regulate commerce or raise revenue. Plaintiffs, therefore, assert that a Commerce Clause analysis is unnecessary. Stated another way, plaintiffs aver that the Commerce Clause can never override the Export Clause.

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[16] As will be discussed in greater detail below, the court need not decide which constitutional provision Congress purportedly relied upon in enacting the reclamation fee.

[17] Def.'s Mot. at 8.

There is a colorable indication that the Supreme Court would protect the export process from infringement by either any regulatory or revenue raising measure. In *North American Co.*, the Supreme Court explained that Congress' Commerce Clause power "is limited by express provisions in other parts of the Constitution, such as Section 9 of Article I ...." *North American Co. v. SEC,* 327 U.S. 686, 704-05 (1946). This statement translates into the proposition that the Commerce Clause is limited by the Export Clause's prohibition. More importantly, in *IBM,* the Supreme Court did not recognize a distinction between regulatory and revenue raising legislation in the export context. *IBM,* 517 U.S. at 860. Specifically, the Supreme Court explained that the Export Clause "prohibits Congress from *regulating* international commerce through export taxes [and] disallows any attempt to raise federal revenue from exports ...." *Id.* at 859 (emphasis added). Thus, support exists for the position that the Export Clause's prohibition does not distinguish between regulatory and revenue raising measures.

On the other hand, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) and the Federal Circuit both declined to forego a Commerce Clause analysis simply because the Export Clause was implicated. In *Moon v. Freeman,* the Ninth Circuit confronted the issue head-on and rejected an argument that the Export Clause is "an across-the-board limitation on the commerce power as well as the taxing power ...." *Moon v. Freeman,* 379 F.2d 382, 390 (9th Cir.1967). The Ninth Circuit explained that the inquiry should focus on whether the primary purpose of the legislation was to raise revenue or to regulate commerce, and whether revenue was only incidentally raised. *Id.* at 391. Further, in *U.S. Shoe,* the Federal Circuit likewise examined whether an economic burden on exports could be upheld under the Commerce Clause. *United States Shoe Corp. v. United States,* 114 F.3d 1564, 1575-77 (Fed.Cir.1997). Although the Federal Circuit ultimately invalidated the Harbor Maintenance Tax (HMT), it first analyzed whether the economic burden itself was regulatory in nature. *Id.* at 1576-77. Accordingly, both *Moon* and *U.S. Shoe* stand for the proposition that in the export context the court should not simply invalidate the legislation, but should examine its character.

The court, however, need not conclusively resolve the tensions between the Export Clause and the Commerce Clause in the export context because plaintiffs prevail irrespective of which interpretation the court adopts. First, pursuant to *IBM,* Congress appears to lack the authority either to "regulat[e] international commerce through export taxes" or to enact legislation which "attempt[s] to raise federal revenue from exports ...." *IBM,* 517 U.S. at 859. In this regard, it would make no difference whether the reclamation fee is a regulation which infringes on exported coal or is directed toward raising revenue. The court would have no option but to strike down the reclamation fee as an unconstitutional economic burden on exportation.

Conversely, under *U.S. Shoe* and *Moon,* the court is required to undertake a more in-depth analysis. Plaintiffs first direct the court's attention to case law which has found that the reclamation fee is a tax. Next, plaintiffs assert that the primary purpose of the reclamation fee is to raise revenue, which is placed in a trust fund, for the reclamation of abandoned mines. Plaintiffs aver that the reclamation fee has no regulatory purpose and, therefore, this case is analogous to *U.S. Shoe*. Plaintiffs maintain that their position is buttressed by the fact that the funds are "on budget" and are used to fund other government programs. Plaintiffs also contend that $500 million has been used to pay for health care benefits for coal industry retirees and dependents. Further, plaintiffs assert that an enormous surplus has accumulated over the years.

Defendant cites to various sections of the SMCRA's Congressional findings to support its argument that the Act as a whole was enacted to regulate interstate commerce. See 30 U.S.C. § 1201(c), (g), (j). Defendant maintains that the presence of Congressional findings distinguish this case from *U.S. Shoe*. Defendant contends, in an argument which the court has already rejected, that the Supreme Court in *Hodel* upheld SMCRA's constitutionality in its entirety against a Commerce Clause challenge. Defendant asserts that the reclamation fee is an integral component of the comprehensive regulatory program upheld in *Hodel*. Defendant also avers that the reclamation fee itself regulates because it forces the coal industry to internalize a cost it would have preferred to externalize. Further, defendant asserts that the money in the trust fund cannot be dispersed without congressional appropriation. Defendant also avers that a surplus does not exist and significant funds are still needed to cover the full cost of reclaiming abandoned mines.

The Ninth Circuit set forth the following test for determining when a fee is a tax as opposed to a regulation:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Moon, 379 F.2d at 391 (citing *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir.1943)). In *U.S. Shoe*, however, the Federal Circuit alluded to the statute as a whole, but focused primarily on the HMT. *U.S. Shoe*, 114 F.3d at 1576. In particular, the Federal Circuit explained:

> It is ... beyond dispute that Congress cannot merely impose a direct economic burden on merchandise for export in the absence of regulation. That is the case here. The government has failed to point to any indication that the HMT is intended to regulate commerce. Indeed, it appears

> that the HMT regulates nothing. It is not designed to reduce the overall use of the ports. Rather, the HMT merely increases the cost of exporting by raising money to maintain the harbors ....

Id. (citations omitted). The court, therefore, focuses on the reclamation fee and concludes that *U.S. Shoe* is dispositive of the issue. The reclamation fee, like the HMT, "regulates nothing." *Id.* It does not encourage or discourage any particular activity,[18] and, for that matter, the SMCRA's legislative history expressly indicated an intent to impose the fee "without 'constrain[ing] the development or production' of coal." *Drummond Coal,* 610 F.Supp. at 1499 (quoting H.R. REP. NO. 218, at 136 (1997), reprinted in 1977 U.S.C.C.A.N. 593, 668). The reclamation fee also does not incidentally raise funds.[19] Similar to the HMT in *U.S. Shoe,* the fee was enacted with the purpose of raising revenue to reclaim abandoned mines or inadequately reclaimed mines.[20] To the extent the reclamation fee can be viewed as recouping costs of a regulatory program, the coal producers, the payers of the fee, just as the exporters in *U.S. Shoe,* are not the direct beneficiaries of the service. *Id.* Rather, the coal producers receive a benefit that is no different from that of the general public. *United States v. River Coal Co., Inc.*, 748 F.2d 1103, 1106 (6th Cir.1984).

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[18] Tr. at 64.

[19] *Id.* at 65.

[20] In addition, since 1996, the interest earned on reclamation fees has been transferred to the United Mine Workers of America Combined Benefit Fund to provide health care benefits to coal industry retirees and their dependents. 30 U.S.C. 1231(c)(12); 30 U.S.C. § 1232(h).

Lastly, in light of *U.S. Shoe,* the court finds defendant's "regulation by internalizing costs argument" unpersuasive. The HMT was directed at exporters who utilized the nation's ports as well as harbors and presumably contributed to their deterioration. According to defendant's reasoning, exporters should have internalized the cost of maintenance and repair. Despite the fact that the HMT would have had the operative effect of requiring exporters to internalize the cost of harbor and port maintenance, the Federal Circuit nevertheless found that it "regulate[d] nothing." *U.S. Shoe,* 114 F.3d at 1576. The court reaches the same result here and concludes that the reclamation fee is indeed a tax.

The parties adopted opposing interpretations of the Federal Circuit's analysis in *U.S. Shoe.* There are several other factors which touch upon the issue and confirm the nature of the Federal Circuit's analysis. As mentioned above, the Federal Circuit specifically opted for the term "HMT." In other sections of the opinion, the Federal Circuit used either "the Comprehensive Water Resources Development Act of 1986 ('the Act')," *id.* at 1566, or "HMT statute." *Id.* at 1577. The Federal Circuit also distinguished in the background section between the HMT and the Act. *Id.* at 1566. Moreover, and perhaps most importantly, the HMT statute in its entirety had indicia of an intent to facilitate commerce. *Id.* at 1578-81 (Mayer, J., dissenting). The Senate Report accompanying the Act also explained that Title 6 and the HMT "affect commercial harbor development and form what is the single most significant feature of this bill: a modern harbor development policy. Throughout the history of this nation, port and harbor development has been essential to maritime commerce."[21] Accordingly, apart from the Federal Circuit's word choice, these factors give additional credence to the conclusion that the primary focus was on the HMT.

Nevertheless, irrespective of whether the Federal Circuit focused on the HMT or the HMT statute, a determination as to which power Congress was seeking to invoke does not necessarily resolve the issue. The trial court in *U.S. Shoe* succinctly set forth the purpose of an Export Clause inquiry:

> [E]ven if the court were to find the Tax to be a charge imposed under the commerce power, such a charge is still subject to the restrictions of the Export Clause if it in fact serves as a tax or duty. For example, a charge upon exports imposed under the Commerce Clause as a user fee, or to regulate commerce, would not be immune from the restrictions of the Export Clause if the court found the charge actually to be a tax or duty on exports. The court looks to substance over nomenclature.

U.S. Shoe, 907 F.Supp. 408, 19 C.I.T. at 1288.[22] With this admonition in mind, the court cannot overlook the plethora of decisions which have consistently concluded that the reclamation fee, contrary to its title, is actually a tax. *River Coal,* 748 F.2d at 1106 (explaining that the reclamation fee "is an involuntary exaction for a public purpose ... [which] has the essential characteristics of a tax ...."); *Drummond Coal,* 796 F.2d at 505 ("[N]owhere does the [SMCRA] specify what elements comprise a 'taxable' piece of coal.") (quoting 610 F.Supp. at 1497); *United States v. Ringley,* 985 F.2d 185, 187 (4th Cir.1993) ("The [defendants] concede that the reclamation fees at issue in this case are excise taxes ...."); *Tri-No,* 819 F.2d at 158 (noting that "[t]he reclamation fee is simply an assessment or excise tax ...."); *United States v. Devil's Hole, Inc.,* 747 F.2d 895, 898 (3d Cir.1984) (holding that "[t]he funding method adopted in Title IV is a fee or excise tax ...."); *United States v. Fire Ring Fuels, Inc.,* 788 F.Supp. 326, 329 (E.D.Ky.1991) (concluding that a "reclamation fee is a tax" and that "[r]eclamation fees are a form of excise taxes ...."); *Spring Ridge Coal,* 793 F.Supp. at 129.

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[21] See also S. REP. NO. 99-126, at 7-9 (1986), reprinted in 1986 U.S.C.C.A.N. 6639, 6645-47.

[22] Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause?: Making Sense of United*

Defendant's efforts to distinguish the above-cited

States v. United States Shoe Corp., 84 MINN. L. REV. 129, 132 (explaining that their analysis "should be applied to any exaction that falls within the scope of 'tax or duty,' whether enacted under an exercise of the Taxing Power, the Commerce Clause, or both"); Erik A. Jensen, *The Export Clause,* 6 FLA. TAX REV. 1, 45 (agreeing that "a tax or duty on exported articles is forbidden, regardless of whether the levy might otherwise have been within Congress' power to regulate commerce").

cases are unpersuasive. As defendant correctly points out, none of the cases dealt with the reclamation fee in the export context. This argument, however, does not change the underlying conclusion reached in those cases- that the reclamation fee is a tax. Further, the true import of the above-cited cases lies not only in their holdings, but in their context. While defendant attaches significant weight to context as a distinguishing factor, defendant's argument actually strengthens plaintiffs' position rather than weakens it. The Supreme Court has explained that an inquiry under the Export Clause is more strict than an inquiry under other constitutional provisions. In *IBM,* the Supreme Court refused to allow Commerce Clause and Import-Export Clause jurisprudence to govern an Export Clause analysis. *IBM,* 517 U.S. at 850-61. Likewise, in *U.S. Shoe,* the Supreme Court reinforced its holding in *IBM* by refusing to rely on more expansive cases outside the Export Clause context. *U.S. Shoe,* 523 U.S. at 367-68. The most pronounced application of this principle was visible in the Federal Circuit's decision in *Thomson Multimedia Inc. v. United States,* 340 F.3d 1355 (Fed.Cir.2003). In that case, the Federal Circuit held that the HMT, which was deemed a tax for purposes of the Export Clause in *U.S. Shoe,* was a user fee in the context of a Uniformity Clause challenge. Accordingly, the reclamation fee's status as a tax in contexts where the analysis is more lenient, i.e., outside the Export Clause context, mandates that it receive the same treatment for Export Clause purposes.

In sum, *Hodel* did not hold that Title IV of SMCRA was a valid exercise of Congress' Commerce Clause power. The parties proffered two positions regarding the proper relationship between the Export Clause and the Commerce Clause. Plaintiffs prevail under either theory. Assuming the Export Clause completely overrides the Commerce Clause, the reclamation fee is unconstitutional irrespective of whether it sought to regulate or raise revenue. Conversely, if a Commerce Clause analysis should be undertaken, the reclamation fee is invalid in the context of this lawsuit because the fee itself does not regulate and because the fee repeatedly has been held to be a tax. These conclusions coupled with defendant's concession that the sale of coal occurs in the export process and with the court's previous holding that the reclamation fee is imposed upon the sale of coal and burdens that event, dictate the result that the reclamation fee as applied to exports is unconstitutional and cannot stand.

Conclusion

For the above-stated reasons, plaintiffs' Motion For Summary Judgment is hereby GRANTED. Defendant's renewed motion to dismiss for failure to state a claim upon which relief can be granted is hereby DENIED. A status conference concerning further proceedings in this case will be held on Wednesday, May 11, 2005, at 2:30 p.m. The court will initiate the call.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-5083

CONSOLIDATION COAL COMPANY, CONSOL OF PENNSYLVANIA COAL COMPANY, CONSOL OF KENTUCKY INC., EIGHTY FOUR MINING COMPANY, HELVETIA COAL COMPANY, ISLAND CREEK COAL COMPANY, KENT COAL MINING COMPANY, KEYSTONE COAL MINING CORPORATION, LAUREL RUN MINING COMPANY, MCELROY COAL COMPANY, NINEVAH COAL COMPANY, QUARTO MINING COMPANY, EAGLE ENERGY, INC., ELK RUN COAL COMPANY, INC., GOALS COAL COMPANY, GREEN VALLEY COAL COMPANY, INDEPENDENCE COAL COMPANY, INC., KNOX CREEK COAL CORPORATION, MAR FORK COAL COMPANY, INC., MARTIN COUNTY COAL CORPORATION, PEERLESS EAGLE COAL COMPANY, PERFORMANCE COAL COMPANY, RAWL SALES & PROCESSING, SIDNEY COAL COMPANY, INC., STONE MINING COMPANY, JIM WALTER RESOURCES, INC., EASTERN ASSOCIATED COAL CORP., KINGSTON RESOURCES, INC., PIONEER FUEL CORPORATION, POWDER RIVER COAL COMPANY, APOGEE COAL COMPANY, ARCH WESTERN RESOURCES, LLC, CANYON FUEL COMPANY, LLC, CATENARY COAL COMPANY, COAL-MAC, INC., DAL-TEX COAL CORPORATION, HOBET MINING, INC., MINGO LOGAN COAL CO., PAYNTER BRANCH MINING, INC., PLATEAU

MINING CORPORATION, RAG CUMBERLAND RESOURCES, L.P., RAG EMERALD RESOURCES, L.P., TWENTYMILE COAL COMPANY, COASTAL COAL COMPANY, LLC, COASTAL COAL-WEST VIRGINIA, LLC, EVERGREEN MINING COMPANY, MID-VOL LEASING, INC., MOUNTAINEER COAL DEVELOPMENT COMPANY, OLD BEN COAL COMPANY, SHIPYARD RIVER COAL TERMINAL COMPANY, RIVERSIDE ENERGY, INC., VIRGINIA CREWS COAL COMPANY, CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, PREMIER ELKHORN COAL COMPANY, PERRY COUNTY COAL CORPORATION, GLAMORGAN COAL COMPANY, LLC, TERRY EAGLE, L.P., NICHOLAS-CLAY LAND & MINERAL, INC., NICHOLAS-CLAY COMPANY, LLC, ANDALEX RESOURCES, INC., GENWAL RESOURCES, INC., PACIFIC COAST COAL COMPANY, USIBELLI COAL MINE, INC., WEST RIDGE RESOURCES, INC., UNITED STATES STEEL MINING COMPANY, LLC,

and

COVENANT COAL CORPORATION,

Plaintiffs-Appellants,

And

WELLMORE ENERGY COMPANY, LLC

(formerly known as Rapoca Energy Company, LLC),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 01-CV-254 and 01-CV-442, Senior Judge Bohdan A. Futey.

ORDER

NOTE: This order is nonprecedential.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellants, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 19, 2010.

FOR THE COURT,

/s/

Jan Horbaly

Clerk

Dated: 10/12/2010

cc: Steven H. Becker; John Y. Merrell, Jr.

Tara K. Hogan

CONSOLIDATION COAL V US, 2009-5083

(CFC - 01-CV-254;01-CV-442)

187

(4)

Supreme Court, U.S.
FILED
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No. 10-1020

In the Supreme Court of the United States

CONSOLIDATION COAL COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, requires coal operators to pay an Abandoned Mine Land fee based upon the weight of coal produced. By regulation, assessment and collection of the fee are delayed until the time of first sale, transfer, or use of the coal. The question presented is as follows:

Whether the Abandoned Mine Land fee, as applied to coal that is eventually exported, is permissible under Article I, § 9, Clause 5 of the United States Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 615 F.3d 1378. The opinion of the Court of Federal Claims (Pet. App. 10a-24a) is reported at 86 Fed. Cl. 384. Prior opinions of the court of appeals (Pet. App. 25a-31a) are reported at 351 F.3d 1374 and 528 F.3d 1344. Prior opinions of the Court of Federal Claims (Pet. App. 32a-69a) are reported at 54 Fed. Cl. 14, 64 Fed. Cl. 718, and 75 Fed. Cl. 537.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2010. A petition for rehearing was denied on October 12, 2010 (Pet. App. 70a-72a). On December 21, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including

February 9, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, in order to, *inter alia*, "promote the reclamation of mined areas * * * which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public." 30 U.S.C. 1202(h). In order to pay for certain reclamation and restoration processes, SMCRA establishes an "Abandoned Mine Reclamation Fund," a trust fund administered by the Secretary of the Interior. 30 U.S.C. 1231. One source of deposits into the fund is an Abandoned Mine Land fee (AML fee) that is imposed on "[a]ll operators of coal mining operations subject to" SMCRA, and that is calculated based on the amount of "coal produced" by such operators. 30 U.S.C. 1232(a). The primary objectives of the Abandoned Mine Reclamation Fund are "the protection[] of public health, safety, and property from extreme danger of adverse effects of coal mining practices," and "the restoration of land and water resources and the environment * * * that have been degraded by the adverse effects of coal mining practices." 30 U.S.C. 1233(a).

With minor exceptions, the AML reclamation fee is imposed upon all "coal produced" by covered operators. 30 U.S.C. 1232(a). The statute provides:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation

> fee of 31.5 cents per ton of coal produced by surface coal mining and 13.5 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 9 cents per ton, whichever is less.

Ibid.[1]

SMCRA authorizes the Secretary of the Interior to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions" of the law, 30 U.S.C. 1211(c)(2), 1242(a) (2006 & Supp. III 2009), and the Secretary has exercised that authority, see 30 C.F.R. Subchap. R. In fashioning the regulatory scheme, the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM) considered two different methods of determining how much coal has been "produced." 42 Fed. Reg. 44,956 (1977). The first approach would have required each coal mine operator to weigh its coal as soon as it was extracted from the earth, before any non-coal materials, such as dirt, rocks, and tree stumps, had been removed. *Ibid.* Under the second approach, the fee calculation would be based on the weight of the coal at the time of its first bona fide sale, transfer of ownership, or use by the mine operator. *Ibid.* The initial sale, transfer, or use represents the first common point where weights are usually determined within the industry. *Ibid.* To accommodate that industry practice, and to allow the operator to remove non-coal materials before the required weighing occurs, OSM adopted the second approach. 42 Fed. Reg. at 62,713-62,716 (final rule); 30 C.F.R. 870.12.

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[1] Before October 1, 2007, the statute imposed a per-ton fee of 35 cents and 15 cents for coal produced by surface mining and underground mining, respectively.

Thus, under SMCRA, a mine operator's legal obligation to pay the reclamation fee arises at the time that coal is "produced," 30 U.S.C. 1232(a), and under the regulations, the amount of the fee owed is calculated at the time of the coal's first sale, transfer, or use, 30 C.F.R. 870.12(b). Operators are permitted to remove impurities before calculating the fee if they keep records demonstrating that they have removed only impurities (rather than coal subject to the fee). 30 C.F.R. 870.12(b)(3)(ii) and (iii). Any "[i]mpurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator," may not be deducted from the gross weight measurement on the basis of which the fee is calculated, except that operators may take a deduction to account for excess moisture that accumulates on the coal after extraction. 30 C.F.R. 870.12(b)(3)(i).

2. In 2001, petitioners—a group of more than 60 coal producers—filed complaints in the United States Court of Federal Claims (CFC), seeking damages in the amount of the AML fees paid upon coal they had allegedly produced and exported from the United States. *Consolidation Coal Co.* v. *United States*, 351 F.3d 1374, 1377 (Fed. Cir. 2003) (*Consolidation Coal II*); see Pet. ii-iii (listing petitioners). Petitioners argued that the AML fee as calculated under the OSM regulations, when imposed on coal that is ultimately exported, violates the Export Clause of the Constitution, U.S. Const. Art. I, § 9, Cl. 5. See Pet. App. 41a-69a. The CFC initially granted summary judgment in favor of the United

States on a jurisdictional ground. *Consolidation Coal Co.* v. *United States*, 54 Fed. Cl. 14 (2002) (*Consolidation Coal I*). That decision was reversed on appeal. *Consolidation Coal Co. II*, *supra*. On remand, the CFC granted summary judgment in petitioners' favor, concluding that, as applied to coal that is exported, the method by which OSM collects the AML fee violates the Export Clause. Pet. App. 32a-69a.

3. The court of appeals reversed and remanded. Pet. App. 25a-31a. The court considered whether the statutory term "coal produced," as used in 30 U.S.C. 1232(a), "refers solely to coal extracted" or "include[s] the entire process of extracting and selling coal." Pet. App. 28a. The court concluded that the first construction would be consistent with the Export Clause but that the second would not. *Id.* at 28a-30a. Applying the canon of constitutional avoidance, the court construed the statutory term "coal produced" to mean "coal extracted." *Id.* at 29a. Accordingly, the court reversed the CFC's grant of summary judgment and remanded the case for further proceedings. *Id.* at 31a.

4. On remand, petitioners renewed their motion for summary judgment, contending that OSM's regulations themselves violate the Export Clause because they "impose[] the reclamation fee on coal extracted *and sold*." Pet. App. 18a. The CFC viewed the Federal Circuit's most recent opinion in the case as effectively holding that OSM's implementing regulations do not violate the Export Clause. *Id.* at 22a. The court therefore granted the government's motion for summary judgment and dismissed the suit. *Id.* at 24a.

5. The court of appeals affirmed. Pet. App. 1a-9a. The court reiterated its prior conclusion that SMCRA imposes the reclamation fee on coal extracted rather

than on coal sold, and it construed the OSM regulations implementing that scheme to be consistent with the statute. *Id.* at 7a-9a. Relying on this Court's decision in *Liggett & Myers Tobacco Co.* v. *United States*, 299 U.S. 383 (1937), the court explained that a fee imposed upon manufacturing is not transformed into a sales tax simply because its collection is deferred until the product is sold or otherwise removed from a factory. Pet. App. 6a-8a. The court concluded that the deferred-payment scheme embodied in OSM's regulations does not affect the constitutionality of the fee, which the court had already determined was imposed upon the production of coal. *Id.* at 6a-9a. Rather, the court of appeals explained, the timing of the fee "simply 'mitigates the burden' on operators by not requiring installation and use of weighing equipment at the time of extraction." *Id.* at 7a (quoting *Liggett*, 299 U.S. at 386).

ARGUMENT

Petitioners argue that, as applied to exported coal, the reclamation fee at issue in this case violates the Export Clause of the Constitution, U.S. Const. Art. I, § 9, Cl. 5. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the fee imposed by SMCRA and implemented through OSM regulations does not run afoul of the Export Clause. That Clause provides: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. This Court has long held that, although the Export Clause prohibits the imposition of taxes on articles "during the course of exportation," it does not pro-

hibit "nondiscriminatory pre-exportation assessments" of taxes on articles that are ultimately exported. *United States* v. *IBM*, 517 U.S. 843, 846-848 (1996); see *id.* at 849-850 ("We have not, however, exempted pre-export goods and services from ordinary tax burdens."). The AML fee at issue in this case is the type of ordinary tax on the manufacture of a product that is not prohibited by the Export Clause even as applied to that portion of the product that is exported. See Pet. App. 4a-9a.

a. SMCRA imposes the AML fee on all "coal produced" in the United States. 30 U.S.C. 1232(a). That statutory provision has been implemented through OSM regulations that also use the phrase "coal produced." See 30 C.F.R. 870.12(a). Although neither the statute nor the regulations define that term, the court of appeals accepted the government's position that "coal produced" means "coal extracted." Pet. App. 30a. Petitioners do not appear to dispute either that the phrase "coal produced" can reasonably be construed to mean "coal extracted," or that the imposition of a fee on coal extracted is permissible under the Export Clause. Petitioners argue instead that OSM's regulations should be construed to impose the AML fee on the sale of coal rather than on its production, and that such a scheme is unconstitutional. Petitioners' argument lacks merit.

OSM's administration of the AML fee is fully consistent with SMCRA's constitutional imposition of a tax on coal produced within the United States. The regulations implementing SMCRA provide that a coal "operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use." 30 C.F.R. 870.12(a). Although the regulation identifies the most likely subsequent dispositions of the coal (sale, transfer, or use), it does not thereby transform the taxable event from "produc[tion]," as specified in the statute. The statutory obligation to pay the fee arises when the coal is "produced"; Section 870.12(a) merely specifies the point in time at which the fee must be paid.

OSM's regulations further specify the method of calculating the amount of the AML fee, providing that "[t]he fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." 30 C.F.R. 870.12(b). That provision is a reasonable—and constitutional—construction of the statutory provision at issue because it is tailored to impose the fee on coal material, *i.e.*, on "coal produced." The regulations permit coal operators to physically remove impurities and similar material (*e.g.*, dirt, rocks, and tree stumps) before determining the amount of coal that has been produced and on which a fee is due. 30 C.F.R. 870.12(b)(3), 870.18. Such a scheme permits operators to more accurately measure the actual quantity of "coal produced," thereby benefitting the producers by reducing the overall amount of the fee owed. Pet. App. 8a. Under prevailing industry practice, moreover, the first common point at which weights are determined is generally the time of the first bona fide sale, transfer, or use of the coal. By providing that the AML fee will be calculated based on the weight of the coal at that time, the regulations obviate the need for a separate weighing at the time of extraction. See 42 Fed. Reg. at 44,956. OSM's accommodation of standard measurement practice within the relevant industry does not transform the fee from a tax on production to a tax on sales or exports.

As petitioners point out (Pet. 5), the run-of-mine weight (*i.e.*, the weight of all the mined materials at the time of extraction) may well differ from the weight of the coal at the time the fee is assessed, particularly if producers remove impurities through a washing process before disposing of the coal. That fact does not indicate, however, that the AML fee is a sales tax. The agency was not faced with a binary choice between imposing a fee on the gross material extracted from the ground and imposing a fee on the sale of coal. As noted, Congress authorized the imposition of a fee on all "coal produced," and OSM reasonably interprets that phrase to mean coal extracted. But the agency acted within its statutory authority, and within constitutional limits, in determining that the weight of coal produced is more accurately and more efficiently determined at the time of sale, transfer, or use by the producer than at the time the gross material is initially extracted from the ground.

There is likewise no merit to petitioners' suggestion (Pet. 17) that a producer's ability to stockpile coal without incurring any obligation to pay AML fees demonstrates that the reclamation fee accrues only "if and when a sale takes place." It is true, though economically unlikely, that a coal operator can evade its obligation to pay the fee by stockpiling coal indefinitely. As the court of appeals observed (Pet. App. 8a), however, that potential loophole indicates a possible enforcement problem for the agency, not a constitutional infirmity in the regulatory scheme. In finding a similar tax upon wine to be a production tax rather than a tax on sale or export, the Ninth Circuit observed that "Congress, in enacting tax laws, * * * did not provide for the highly unlikely, mere possibility that * * * the produced wine * * * will be kept unsold or unmoved from the factory or the winery indefinitely." *Rogan* v. *Conterno*, 132 F.2d 726, 728 (1942); see *R.J. Reynolds Tobacco Co.* v. *Robertson*, 94 F.2d 167, 169 (4th Cir. 1938) (rejecting Export Clause challenge to tax upon manufacture of tobacco for which payment was deferred until time of sale). The vast majority of coal produced will in fact be sold, transferred, or used. As petitioners acknowledge (Pet. 17), when a producer disposes of its stockpiled coal, OSM enforces the producer's obligation to pay the fees owed on the coal produced by "assessing" the tax.[2]

b. The court of appeals' decision in this case is consistent with this Court's precedents. In *Cornell* v. *Coyne*, 192 U.S. 418, 419 (1904), the Court considered an Export Clause challenge to a tax assessed "upon all filled cheese which shall be manufactured," including cheese manufactured under contract for export. The Court explained that the Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." *Id.* at 427. It concluded that "[s]ubjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export." *Ibid.* By contrast, the Court held in *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, 67-69 (1923), that a fee on all baseball bats and balls "sold" could not be applied to goods sold to a foreign buyer and delivered to an export carrier because tax liability was triggered by (not merely measured at the time of) the sale of the items rather than by their manufacture.

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[2] As evidence that OSM imposes the fee upon sales rather than extraction, petitioners point to a 2004 OSM rule that never went into effect. Pet. 17 (citing 69 Fed. Reg. 56,122, 56,127-56,128 (2004)). That rule was published in the Federal Register two weeks before SMCRA's initial AML fee rates were set to expire on September 30, 2004. The rule, which would have established new lower fee rates, noted that fees for stockpiled coal that was mined before October 1, 2004, would be determined using the prevailing fee rates at the time of first sale, transfer, or use. Before the new rates could take effect, however, Congress extended the original fee rates. See Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 135(a), 118 Stat. 3068 (2004). But even if that rule had taken effect, it would merely have perpetuated the existing regulatory regime by determining the amount of the fee imposed on coal produced, as measured at the time of its first sale, transfer, or use. See 69 Fed. Reg. at 56,128.

In *Liggett & Myers Tobacco Co.* v. *United States*, 299 U.S. 383, 384 (1937), this Court considered a tax imposed "[u]pon all tobacco and snuff manufactured * * * and hereafter sold * * * or removed for consumption or sale." The law at issue specified that the tax "accrue[d] on such manufacturers upon removal from the factory or place where" the tobacco or snuff was manufactured. *Ibid.* The Court rejected the contention that, as applied to tobacco products sold to state-owned entities, the tobacco tax was an invalid tax upon the purchasing States. The Court instead concluded that the tax was a tax on the manufacture of tobacco rather than its sale, even though the duty to pay the tax did not accrue until the first sale or removal from the factory of the tobacco. *Id.* at 386-387. As the Court explained, deferral of the duty to pay the tax was "a privilege designed to mitigate the burden; it indicates no purpose to impose the tax upon either sale or removal." *Id.* at 386.

As petitioners observe (Pet. 19), the Court in *Liggett* was not faced with the question whether the tax at issue violated the Export Clause.[3] But the dispositive question in that case—*i.e.*, whether the tax was a tax on sales or a tax on manufacturing—is also the dispositive question here. And just as the tax at issue in *Liggett* was held to be a tax upon the manufacture of tobacco that was assessed at the time of sale or transfer, the AML fee at issue here is a tax upon the manufacture of coal, assessed at the time of sale, transfer, or use.

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[3] In concluding that the tobacco tax was a manufacturing tax that did not burden the sale of goods, however, the Court in *Liggett* relied on its earlier decision in *Cornell*, which did involve a challenge under the Export Clause. See *Liggett*, 299 U.S. at 386-387.

The respective taxes in the two cases share another feature as well. The Court in *Liggett* noted that the tax was laid as a fixed amount upon each "pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale." 299 U.S. at 386; see *ibid.* ("The goods may be disposed of at any price without affecting the amount of the tax; that does not vary. Always the manufacturer must pay 18 cents upon each pound—no more, no less."). As relevant to this case, the AML fee also depends on the weight rather than the price of the coal: the fee is a flat 31.5 cents per ton of coal produced by surface mining and 13.5 cents per ton of coal produced by underground mining.[4]

2. Contrary to petitioners' contentions, the Federal Circuit's decision in this case does not conflict with any decision of another court of appeals.

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[4] Prior to October 1, 2007, the statute imposed a 35-cent and 15-cent per-ton fee for surface mining and underground mining, respectively. Both the statute, 30 U.S.C. 1232(a), and the regulation, 30 C.F.R. 870.13, provide a cap if the cents-per-ton assessment would exceed ten percent of the value of the coal at the mine (fair market value minus transportation costs). This cap applies primarily in cases where a coal producer is selling or transferring low-grade waste coal, often where the coal producer is attempting to reclaim the land. None of the fees at issue in this suit were assessed using the ad valorem method, and the petitioners do not contend that the fees they paid were based upon the value of coal rather than its weight.

a. Petitioners contend (Pet. 17-18, 23, 26-27) that the decision below conflicts with the D.C. Circuit's decision in *Drummond Coal Co.* v. *Hodel*, 796 F.2d 503 (1986), because OSM offered a different interpretation of its regulations in *Drummond Coal* and the D.C. Circuit adopted that interpretation. Petitioners assert (Pet. 26-27) that the Federal Circuit's interpretation of the OSM regulations would impose a tax upon the extraction of coal while the D.C. Circuit's interpretation of the same regulations would impose a tax upon the sale of coal. That argument reflects a misunderstanding of the regulatory scheme and the decisions construing it.

Under both the Federal Circuit and the D.C. Circuit interpretations of the OSM regulations, SMCRA imposes a fee on all "coal produced," and the amount of the fee is determined at the time of the first sale, transfer, or use of the coal. Pet. App. 8a, 29a-30a; *Drummond Coal*, 796 F.2d at 504-508. *Drummond Coal* did not involve a challenge under the Export Clause. Rather, the coal producer in that case argued that the regulations then in place, which did not permit producers to take a deduction for moisture that accumulates between the time coal is removed from the earth and the time of sale, were inconsistent with SMCRA because materials other than coal were being included in the fee calculation. 796 F.2d at 504. The D.C. Circuit rejected that challenge, holding that it was reasonable for OSM to calculate the amount of the fee due on the "coal produced" at the time of sale, including any excess moisture that might have accumulated on the coal. That is consistent with the result in this case, which defers to the agency's interpretation of when, as a matter of administering the AML fee, to calculate the fee due on the coal product that is ultimately sold, transferred, or used.

In *Drummond Coal*, the D.C. Circuit suggested that the OSM regulations then in effect rested on the premise that "production" of coal "include[s] the entire process of extracting and selling coal, complete from pit to buyer's door." 796 F.2d at 505; see Pet. 26-27. OSM's prior refusal to allow a deduction for "excess moisture," however, need not be understood in that manner. Rather, the agency could have concluded that weight at the time of sale is the soundest and most administrable proxy for weight at the time of extraction, and that any effort to estimate the amount of moisture that has been added between extraction and the time the coal is first weighed would be unduly burdensome. Indeed, the D.C. Circuit in *Drummond Coal* noted those practical difficulties in upholding OSM's then-existing regulatory approach. See 796 F.2d at 507.

In any event, even if there were a conflict between the two decisions, petitioners acknowledge (Pet. 16) that OSM revised its regulations soon after the ruling in *Drummond Coal* to permit producers to take a deduction for any excess moisture that might be absorbed after removal of coal from the mine. 30 C.F.R. 870.18; 53 Fed. Reg. 19,718 (1988). Petitioners, who filed suit in 2001, are well outside the limitations period for challenging any AML fees that were calculated before that regulatory change was adopted in 1988. Insofar as OSM's choice between alternative collection methodologies bears on the constitutional question presented here, petitioners' suit should be decided based on the regulatory scheme in effect at the time of the assessments that are the subject of their current legal challenge.

b. Petitioners are also incorrect in arguing (Pet. 13, 22-24; see also brief of amici law professors) that the court of appeals' decision widens an existing circuit split "over whether the canon of constitutional avoidance takes precedence over the deference owed to an agency's settled interpretation of a statute that it implements under a direct delegation from Congress." Petitioners' argument is based on an incorrect premise—namely, that "the Secretary has, through his regulations, authoritatively interpreted SMCRA as imposing a tax on sales." Pet. 23. As discussed above, and as the court of appeals recognized, see Pet. App. 8a, that is a mistaken interpretation of OSM's regulations.[5] Although the regulations require the AML fee to be computed and assessed at the time of the first sale, transfer, or use, the tax is imposed on the production of coal rather than upon its sale.

3. Review by this Court is not warranted for three other related reasons.

a. It cannot reasonably be disputed that SMCRA validly imposes a fee on coal extracted from the earth. Petitioners therefore would be legally obligated to pay AML fees even if OSM were required to calculate the amount of the fee due immediately upon extraction, based on the weight of the gross material that is removed from the ground, rather than at a later date after producers have an opportunity to remove impurities from the coal. 30 U.S.C. 1232(a). And, as between those potential assessment methodologies, OSM's regulatory approach produces lower fees than would a requirement that fees be calculated at the time of extraction. Thus, even if petitioners' view of the Export Clause were accepted, petitioners could not likely establish an entitlement to refunds for payments made in the past, since they could not demonstrate that they have paid fees higher than those they would have owed under a constitutionally valid assessment methodology.

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[5] In characterizing the AML fee as a tax on sales, petitioners repeatedly suggest (*e.g.*, Pet. 12) that, under OSM's regulations, the sale of coal is the *only* event that can trigger the assessment and collection of the fee. OSM's regulations in fact provide that "[t]he fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." 30 C.F.R. 870.12(b).

b. Before the Court could decide the question presented, it would first need to resolve the jurisdictional issue raised by the United States in earlier proceedings in this case. See *Consolidation Coal II*, *supra,* 351 F.3d at 1380-1381. Because petitioners do not dispute that SMCRA could be constitutionally applied to coal produced for export, their argument is essentially that OSM's fee-deferral regulations exceed the bounds of the statute or are otherwise *ultra vires*. Challenges to OSM's regulations must be brought in the District Court for the District of Columbia within 60 days after promulgation of the relevant rule, however, see 30 U.S.C. 1276(a)(1), and the Federal Circuit has held that requirement to be jurisdictional, see, *e.g.*, *Amerikohl Mining, Inc.* v. *United States*, 899 F.2d 1210, 1215 (1990). Indeed, the plaintiff in *Drummond Coal* filed suit in the D.C. district court to challenge the assessment methodology set forth in OSM's regulations (and, in particular, OSM's refusal at that time to allow a deduction for excess moisture), but it did not contend that deferred collection of the AML fee created an Export Clause violation.

The court of appeals rejected the United States' jurisdictional argument in this case, holding that the Export Clause creates a cause of action against the government that can be brought under the Tucker Act. See *Consolidation Coal II*, 351 F.3d at 1380-1381. As this Court subsequently recognized in *United States* v.

Clintwood Elkhorn Mining Co., 553 U.S. 1, 9 (2008), however, the correctness of that conclusion remains an open question. The Court's decision in *Clintwood Elkhorn* also makes clear that, even if the Export Clause does create a cause of action, suits to enforce that right remain subject to the timing requirements imposed by Congress. See *id.* at 9-12.

c. Petitioners contend that "the decision below provides a ready roadmap for the Government to evade the clear and strict terms of the Constitution." Pet. 13; see Pet. 28. The features of the regulatory scheme that petitioners view as constitutionally objectionable, however, were intended (and in fact function) as accommodations to the coal industry, see pp. 3-4, *supra*, and their natural effect is to reduce the AML fees petitioners owe on *all* the coal they produce, whether intended for export or otherwise. And even after the D.C. Circuit held in *Drummond Coal* that OSM was not required to allow a deduction for excess moisture, the agency amended its regulations to authorize such a deduction, thereby eliminating the main practical disadvantage to the industry that the deferred-collection method had previously entailed. See p. 14, *supra*.

Because SMCRA's directive that fees be assessed on "coal produced" is clearly susceptible of constitutional application to coal intended for export, there is no ground for suggesting that the government has concealed the true character of the tax in order to rebut an Export Clause objection. Rather, having reaped the benefits of OSM's regulatory accommodations over a prolonged period of time, petitioners now invoke those accommodations as grounds for refunds of assessments previously paid. This case cannot plausibly be viewed as one involving manipulative government conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-1020

IN THE

Supreme Court of the United States

CONSOLIDATION COAL COMPANY ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

A quarter-century ago, the D.C. Circuit upheld the Office of Surface Mining's regulation taxing the "sale" of processed, clean coal. But because the Export Clause forbids taxing the sale of goods bound for export, the Federal Circuit in this case expressly rejected that decision. It recharacterized OSM's regulation as constitutionally taxing petitioners' "extraction" of raw coal. The court then invoked the "canon of constitutional avoidance" to apply its new characterization retroactively – which, it held, saved OSM's previous taxation of petitioners' past coal "sales."

The petition and *amicus* briefs demonstrated that the Federal Circuit's decision conflicts with this Court's precedents and decisions of other circuits. The government has previously argued that Federal Circuit decisions resolving a large number of claims "seeking the recovery of coal excise taxes and related interest" (here consolidated in a single suit) are so important as to merit certiorari, relying on the Court's practice of reviewing similar decisions. Pet. for Cert. 25, *United States v. Clintwood Elkhorn Mining Co.*, *cert granted*, 128 S. Ct. 710 (2007). The Brief in Opposition offers no persuasive reason to abandon that practice here. Instead, it contradicts the Solicitor General's previous representation to this Court that OSM taxed the "sale" of processed coal rather than the raw coal's extraction, as well as that Office's request that this Court decide whether the lower courts have jurisdiction to decide such a claim.

Certiorari accordingly should be granted, and the parties should be directed to brief and argue the jurisdictional issue.

I. The Ruling Below Conflicts With Decisions Of This Court And Of Other Circuits.

OSM explicitly taxes the "sale" of petitioners' coal. 30 C.F.R. § 870 12(b). It imposes that tax at the time of sale, based on the tax rate prevailing on the date of sale, and measured by the weight of the coal that petitioners sell, which generally is materially different from the weight of the raw coal they extract. *Id.*; Pet. 5-6. So this should be an easy case: this Court's precedents hold that the Export Clause forbids taxing the "sale" of a product in the stream of export commerce. *E.g.*, *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923); *see* Pet. 14-15. The Federal Circuit's contrary ruling merits this Court's review

A. The government cannot deny that "OSM offered a different interpretation of its regulations in *Drummond Coal* [*v. Hodel*] and the D.C. Circuit adopted that interpretation." BIO 13. In *Drummond Coal*, the D.C. Circuit held – not "suggested," *contra id* 14 – that OSM's taxation of non-combustible "post-extraction added impurities, such as rainwater or debris" was lawful. 796 F.2d 503, 505 (D C. Cir. 1986), *cert denied*, 480 U.S. 941 (1987). The Court found "coal produced," 30 U.S.C. § 1233(a), to be sufficiently "ambiguous" to permit OSM to tax the end product's sale, not merely the raw coal's extraction. 796 F.2d at 505-06.

This long-settled "interpretation of OSM's regulation[]" was not "mistaken," *contra* BIO 15, but if it was, then OSM asked the D.C. Circuit to make the "mistake[]," the Solicitor General vigorously defended it in this Court, and for twenty-five years the agency happily collected the revenues generated by the sweeping taxing power that resulted. Solicitor General Fried successfully opposed certiorari in *Drummond Coal* on the ground that OSM had correctly "stressed that the *crucial* factor was *not* the specific composition of the coal produced but, rather, the point in the mining operation at which the *first sale* or transfer occurred." BIO 2 n 1, *Drummond Coal v. Hodel* (No. 86-1057) (emphases added). He forcefully asserted that the contrary position now pressed by OSM, adopted by the Federal Circuit, and endorsed by that Office "has no basis in the statute, its legislative history, or in the consistent interpretation of the relevant term by [OSM]." *Id.* 5.

Faced with the obvious conclusion that it had violated the Export Clause by applying the tax to the sale of coal bound for export, OSM's lawyers did a one-hundred-eighty-degree turn and labeled the regulation and its past application as a tax on "extraction." The Federal Circuit blessed that reversal. It parroted *Drummond Coal*'s holding verbatim, 796 F.2d at 505, and rejected it. "if 'coal produced' is interpreted to include the entire process of extracting and selling coal – if it is a tax on extraction *and* sale – then, as it applies to sales that occur in the export process, it is an unconstitutional violation of the Export Clause." Pet. App. 28a.

The government's assertion that the circuits' decisions are nonetheless "consistent" because both circuits "[defer] to the agency[]," BIO 13, is – to borrow a phrase – "mistaken," *id.* 15. The courts "defer" to doppelgangers, so they reach irreconcilable results. That conflict is also intolerable: the Federal Circuit holds that OSM may tax only the extraction of combustible material, Pet. App. 8a n.3, 30a, yet recognizes that OSM follows the D.C. Circuit's conflicting holding that OSM may tax significant materials that producers add "post-extraction," 796 F.2d at 505, including "oil and antifreeze," Pet. App. 7a. *Contra* BIO 14 (asserting that amendment excluding post-extraction water weight deprives the conflict of importance).

Further, the Federal Circuit's holding that this exaction is saved by labeling it an "extraction tax" contradicts this Court's holding that courts "must regard things rather than names, in determining whether an imposition on exports ranks as a tax" that violates the Export Clause. *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998). The Solicitor General notably does not deny that the decision below underrules *A.G Spalding*, *supra* Pet. 18. This Court struck down the tax on baseball bat sales in that case, but the Federal Circuit's decision would deem it a constitutional "deferred" tax on the bats' manufacturing. *Cf.* U.S. Br. 17, *A.G. Spalding & Bros. v. Edwards* (No. 710) ("the primary purpose of the Act . . . was to tax manufacturers"). The Federal Circuit's nullification of this Court's precedents sweeps far beyond hard fuel and sports gear: if this "sales" tax is properly recharacterized as a "deferred-payment scheme" for a manufacturing tax, BIO 6, so is every other, *see generally* Exporter *Amicus* Br., rendering the Constitution's prohibition against export taxes not "strict" but instead essentially meaningless.

B. The Federal Circuit's further holding that the "canon of constitutional" avoidance required it to retroactively deem OSM's *previous* taxation of petitioners' "sales" an "extraction" tax merits this Court's review too. *See* Pet. 24-26; Profs. *Amicus* Br. Part I. The Federal Circuit's reasoning is *ipse dixit* – *viz.*, because the Export Clause forbade OSM from taxing export sales, it must not have done so, all appearances notwithstanding. The court of appeals explained that this fiction was "the only reasonable construction which preserves the constitutionality" of OSM's prior exactions. Pet. App. 30a, *id.* 8a (applying the court's statutory analysis to OSM's past imposition of the tax).

After the petition made a big deal of the fact that this holding conflicts with this Court's precedents, the Solicitor General says not a word in response. That is no surprise; there is nothing to be said. The canon of constitutional avoidance is prescriptive, not descriptive. It orders the government's future conduct to conform to the Constitution; it does not erase a history of constitutional violations. *See, e.g.*, *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). The Federal Circuit's contrary decision is not "constitutional avoidance," it is "reality avoidance."

II. The Alternative Rulings Hypothesized By The Solicitor General Are Irrelevant And Wrong.

Faced with these conflicts, the government argues that "both the Federal Circuit and the D.C. Circuit," BIO 13, "could have" used different rationales, *id.* 14. Supposedly, the courts – rather than applying the canon of constitutional avoidance retroactively (Federal Circuit) and holding that OSM validly taxed the coal's "sale" (D.C. Circuit) – instead "could have" held that OSM actually taxed the coal's extraction while merely delaying the ministerial act of the tax's collection, because "weight at the time of sale is the soundest and most administrable proxy for weight at the time of extraction." *Id.* That assertion is legally irrelevant and factually wrong.

A. The alternative opinions hypothesized by the government are irrelevant because the petition for certiorari arises in the real world – a world in which the lower courts' actual rulings conflict with this Court's precedents and are the subject of recognized circuit splits. The Solicitor General's plea that the government can imagine different, consistent legal rulings does not undermine the petition's showing that certiorari should be granted, because denying review would leave the law in intolerable conflict while OSM continues to exploit the D.C. Circuit's decision that it may tax the sale of "post-extraction" additives.

Also, the Solicitor General's assertion that OSM collected the tax at the point of sale for "convenience" begs the question presented by this case. Even if true, the upshot is that the agency found it most convenient to impose a sales tax, which is unconstitutional. Whatever OSM's motive, the dispositive point is that it made the "sale," 30 C.F.R. § 870.12(b), the "taxable event," *A.G. Spalding*, 262 U.S. at 69-70. The argument that although the Constitution imposes a "strict[]" bar to a tax "that falls on exports during the course of exportation," *United States v. IBM*, 517 U.S. 843, 849 (1996), there should be an implied exception for any agency that finds it "convenient" to adopt such a sales tax answers itself. "[A]lthough efficacious administration of governmental programs is not without some importance," this is one of those instances in which "the Constitution recognizes higher values than speed and efficiency." *Frontiero v Richardson*, 411 U.S. 677, 690 (1973).

The government's specific assertion that the "prevailing industry practice" is to first weigh clean coal upon sale rather than "run-of-mine" coal at extraction, BIO 8, is false too. Producers weigh the raw coal – for example, to determine royalties owed to landowners and reserve holders, as well as fees owed to shippers for transporting the coal to processing plants. The Solicitor General's citation to a 1977 comment by OSM, *id.*, fails to recognize that OSM in 1982 adopted a regulation requiring operators to "retain records that show run-of-mine tonnage," 30 C.F.R. § 870.12(b)(3)(ii), and that OSM's official guidance reinforces that "[t]he importance of maintaining records that show run-of-mine or raw tonnage calculations that substantiate the basis of clean coal transactions cannot be overemphasized," OSM Payer Handbook 41, *available at* http://sscr.osmre.gov/handbook/documents/payer_handbook.htm.

B. In any event, four features prove this cannot be a deferred tax on coal extraction. Posed as a question, if OSM had actually *tried* to tax coal in violation of the Export Clause, what would it have done differently? The answer: nothing.

First, and most obviously, OSM has never taxed raw coal that operators extracted but then stored rather than sold The Solicitor General acknowledges now – just as OSM has always recognized before, Pet. 17 (citing cases) – the agency's firm policy of "assessing" the tax only if and "when a producer disposes of its stockpiled coal." BIO 10. The Federal Circuit's statement that it believes a tax liability on stored coal should arise, *id.* 9 (citing Pet. App. 8a), proves petitioners' point: the court improperly rewrote the history of OSM's *actual* administration of the tax to conform to the fiction of the court's *post hoc*, counter-factual understanding of how OSM *should* administer the tax to avoid violating the Export Clause.

Second, OSM measures the *ad valorem* tax based on the coal's market value, measured by sales price, on the date of sale, not "extraction." Pet. 15.

Third, when tax rates change, OSM consistently applies the rate in force on the date of sale, not the date of extraction. The petition gave one example. Pet. 17. Here is another: OSM in 2007 applied newly adopted tax rates to sales of previously mined coal. *See* OSM Payer Handbook, *supra*, at 9.

Fourth, OSM assesses the tax based on the "weight" of the product that is sold, including when (as is often true) the coal's processing makes the weight quite different from the "raw" extracted coal. 30 C.F.R. § 870.12(b)(3)(i); 42 Fed. Reg. 62,713, 62,714 (Dec. 8, 1977).[1]

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[1] The taxes in the three cases cited by the Solicitor General, BIO 9, 11, lacked each of these four features For example, in stark contrast to OSM's coal tax, the tobacco tax in *Liggett & Myers Tobacco Co v United States* – which in any event did not involve a challenge under the stringent provisions

C. There is no merit to the Solicitor General's related suggestion that "coal produced" refers only to the *combustible* material, the weight of which supposedly is best measured at sale after impurities – "*e.g.*, dirt, rocks, and tree stumps" – are removed. BIO 8; Pet. App. 8a n.3. OSM's regulation rejects that reading: it taxes material that is added after extraction (except water), as well as the significant non-combustible material that is not removed. In defending its regulation as consistent with the statute, OSM argues (contrary to the BIO) "that tonnage of 'coal produced' *includes* the weight of rock, clay, dirt and other debris mined with the 'coal' that was delivered by the companies to a coal washing and sizing plant." *United States v. Brook Contracting*, 759 F.2d 320, 321 (3d Cir. 1985) (emphasis added).

If anything, the Solicitor General's flip flop on the meaning of the phrase "coal produced" highlights another reason to grant certiorari. The Third Circuit held that "coal" means only the combustible material, so it ruled that OSM's regulation taxing non-removed impurities "exceeds the scope of [the statute] and is therefore invalid." *Brook Contracting*, 759 F.2d at 326-27. But the D.C. Circuit elected "respectfully to disagree with the Third Circuit" and to defer to OSM's position that the phrase "coal produced" is

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of the Export Clause – was imposed "irrespective of intrinsic value or price obtained upon sale. The goods may be disposed of at any price without affecting the amount of the tax; that does not vary." 299 U.S. 383, 386 (1937). *See also Rogan v. Contero*, 132 F.2d 726, 727 (9th Cir. 1942) ("[t]he statutes for tobacco [in *Liggett*] and still wines are basically the same"), *R.J. Reynolds Tobacco Co. v. Robertson*, 94 F.2d 167 (4th Cir. 1938).

ambiguous and "include[s] the entire process of extracting and selling coal, complete from pit to buyer's door." *Drummond Coal Co. v. Hodel*, 796 F.2d at 505-06. By granting certiorari, this Court would resolve which of those interpretations is correct.

III. The Government's Jurisdictional Argument Warrants Certiorari.

Petitioners filed this suit under the Tucker Act alleging that OSM had violated the Export Clause. The government tried to recharacterize the suit as if petitioners argue that OSM's "regulations exceed the bounds of the statute or are otherwise *ultra vires*." BIO 16 But it recognized that the circuits were split on whether 30 U.S.C. § 1276(a)(1) required petitioners to file such a suit in the U.S. District Court for the District of Columbia upon the regulations' enactment. U.S. C.A. Br. 19 n.3.

The Federal Circuit panel correctly found jurisdiction. Reply App. 15a. Section 1276(a)(1) says that a challenge to OSM's "promulgat[ion]" of "national rules" is "subject to judicial review" under its provisions. That statute does not say (or imply) much more broadly that every other jurisdictional basis for a suit that implicates a regulation's validity is withdrawn. Congress rejected a provision that would have made the statute's jurisdiction "exclusive." *Holmes Limestone Co. v. Andrus*, 655 F.2d 732, 737 (6th Cir. 1981), *cert. denied*, 456 U.S. 995 (1982). The Federal Circuit therefore correctly concluded that Section 1276(a)(1) does not displace the separate jurisdiction conferred by the Tucker Act. *Accord Indep. Cmty. Bankers v. Bd. of Govs.*, 195 F.3d

28, 34 (D.C. Cir. 1999) ("We have frequently said that a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits.").

The government's broad reading of Section 1276(a)(1) must also be rejected because it would render that statute unconstitutional. It would strip any court of jurisdiction to decide petitioners' Export Clause claim because sixty days after the promulgation of OSM's regulation, no producer – even those petitioners that did not *exist* in 1977 – could contest ongoing taxation by OSM that is indisputably forbidden. Constitutional avoidance cuts both ways. *See Blanchette v. Connecticut General Ins. Corps*, 419 U.S. 102, 134-35 (1974) (refusing to construe statute as stripping Tucker Act jurisdiction over Fifth Amendment claims when no other remedy was available).

But the jurisdictional issue is the subject of a circuit split that merits this Court's review. *Compare* Reply App. 15a (Section 1276(a)(1) is not exclusive) *and Holmes Limestone Co., supra* (same) *with United States v. Troup*, 821 F.2d 194, 198-99 (3d Cir. 1987) (because Section 1276(a)(1) is exclusive, that court's invalidation of OSM's regulation in *Brook Contracting* is ineffective; acknowledging the circuit conflict), *Drummond Coal Co. v. Watt*, 735 F.2d 469, 472-76 (11th Cir. 1984) (exclusive), *and Tug Valley Recovery Ctr. v. Watt*, 703 F.2d 796, 799-800 (4th Cir. 1983) (same).

The BIO's contrary assertion that the jurisdictional issue renders certiorari "not warranted," BIO 16, is just another unexplained *volte face*: the Solicitor General previously urged this Court to grant certiorari to decide this exact question. Pet. for Cert , *Watt v. Holmes Limestone Co.* (No. 81-1585). No circuit conflict existed at that time, and review was denied over two published dissenting votes. 456 U.S. 995 (1982). With the conflict now firmly established, certiorari should be granted, and the parties should be directed to brief and argue an additional question: "Did the lower courts have jurisdiction notwithstanding 30 U.S.C. § 1276(a)(1)?" *Cf. Osborn v. Haley*, 547 U.S. 1126 (2006).

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, certiorari should be granted.

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CONSOLIDATION COAL COMPANY, *ET AL.*,
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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

◆

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS, THE NATIONAL ASSOCIATION OF MANUFACTURERS AND NEXCO IN SUPPORT OF PETITIONERS

◆

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BRIEF *AMICI CURIAE*

The American Association of Exporters and Importers ("AAEI"), the National Association of Manufacturers ("NAM") and NEXCO hereby respectfully submit this brief *amici curiae* in support of the Petition for Writ of Certiorari to the U.S. Court of Appeals for the Federal Circuit filed by Consolidation Coal Company *et al.* Pursuant to Rule 37.2(a), counsel of record received timely notice of our intention to file this brief, and all parties provided their written consent.[1]

I. INTERESTS OF *AMICI CURIAE*

Founded in 1921, AAEI is a national association that represents the entire spectrum of the international trade community across all industry sectors. Members include manufacturers, importers, exporters, wholesalers, retailers and service providers to the international trading community such as customs brokers, freight forwarders, banks, insurers, transportation companies and ports. Many of these enterprises are small and medium-sized businesses seeking to export to foreign markets. Products manufactured or exported by AAEI member businesses include, among others, chemicals, pharmaceuticals, electronics, machinery, automobiles and automotive parts, energy, food, household consumer goods, toys, specialty items, textiles and apparel, and footwear.

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[1] No party or entity other than *amici curiae* and its counsel authored this brief in whole or in part or made a monetary contribution intended to fund this brief's preparation or submission.

AAEI plays an important role in commenting on import and export regulation and trade facilitation matters in the international context. Congressional committees often call on AAEI to offer its technical expertise on policy and regulatory matters affecting global commerce. AAEI has also participated as *amicus curiae* in a number of cases involving issues of interest to its members in this Court, the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade.[2]

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

NEXCO, previously known as the National Association for Export Companies, is an international trade association that represents and educates its members, who include exporters, freight forwarders, importers, customs brokers, bankers, attorneys, accountants, and other international trade companies and professionals. NEXCO members are primarily U.S. and multinational companies and entities of all sizes.

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[2] *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Matsushita Electric Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *United States v. Ford Motor Co.*, 497 F.3d 1331 (Fed. Cir. 2007).

Amici represent groups well-positioned to articulate the interests of the trade community in this case, to provide the Court with a broad perspective as to the impact of *Consolidation Coal* on U.S. exporters and the U.S. economy, and to bring to the Court's attention relevant matter not already brought to its attention by the parties.

Consolidation Coal[3] is significant to *amici's* members because it threatens U.S. exporters. At a time of extreme federal budget deficits, the decision tempts the Executive and Legislative Branches to tax exports in contravention of the Export Clause. Ironically, this threat arises when the Administration seeks to double exports in five years to stimulate growth in the worst economic times since the Great Depression. *Amici* members, large and small, are seeking export markets to create jobs in the United States.

II. STATEMENT

Amici hereby adopt, without change, the Statement of the Case provided by the Petition of Consolidation Coal Company *et al.*

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[3] *Consolidation Coal Co. v. United States*, 615 F.3d 1378 (Fed. Cir. 2010) (hereinafter "*Consolidation Coal*").

III. SUMMARY OF ARGUMENT

The Federal Circuit's decision in *Consolidation Coal* disregards a century of this Court's jurisprudence, which has consistently upheld the Export Clause's absolute ban against any tax burden on exports.[4] Instead, the decision substitutes the much more lenient test under the wholly irrelevant governmental immunity doctrine, which bars only a narrow category of taxes imposing a "direct burden" on state government. This creates a considerable gap in the protection afforded export commerce by the Export Clause.

If *Consolidation Coal* is not reversed, its invitation and roadmap to tax exports will encourage administrative agencies and Congress to exploit weaknesses in existing statutes and regulations, by applying excise taxes to many currently exempt, exported articles. The urgency to raise revenues and defray a massive federal deficit will breed further defiance of the Export Clause, through mischaracterization of statutory and regulatory language, and the passage of statutes and promulgation of regulations that violate the Clause outright. The result not only threatens the national economic recovery plan but also seriously jeopardizes the health and, indeed, the very survival of thousands of small and medium-sized U.S. businesses viewed as key to U.S. economic growth.

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[4] U.S. CONST. art. I, § 9, cl. 5.

IV. ARGUMENT

A. IF NOT REVERSED, *CONSOLIDATION COAL* WILL PROVIDE A BLUEPRINT FOR ADMINISTRATIVE AGENCIES AND CONGRESS TO CIRCUMVENT EXPORT-CLAUSE PROHIBITIONS.

Historically, many federal taxes have tested—and often violated—the Export Clause. Excise taxes, imposed by means of Subtitles D and E of the Internal Revenue Code,[5] are an example. Generally, an "excise tax" imposes a monetary charge on "the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax)."[6] Although exemptions for export sales generally prevent the excise taxes from running afoul of the Export Clause, in some instances no exemption exists or regulations severely limit the scope of the exemption. Indeed, as discussed below, a bill introduced in Congress just last month would tax exports in violation of the Export Clause. The Federal Circuit's decision in *Consolidation Coal* expands the opportunity for such unlawful governmental action to continue and grow at the expense of U.S. exports.

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[5] 26 U.S.C.S. §§ 4001-5891 (2011).

[6] BLACK'S LAW DICTIONARY: NEW POCKET EDITION 615 (1996).

1. Vulnerabilities in Existing Statutes and Regulations Pave the Way for Further Impermissible Export Taxation Based on *Consolidation Coal.*

Statutory wording of federal excise taxes varies considerably. Sometimes they tax the "sale" of an article, [7] while other times the article "sold," [8] and still other times the article "produced" or "manufactured."[9] In the case of firearms, three separate statutory provisions impose excise taxes on the "sale" of firearms, "firearms transferred" and the "making" of firearms.[10] This variety of language has historically enticed Governmental entities to impose excise taxes in a manner that violates the Export Clause.[11] If not again stopped by this Court, the

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[7] *See, e.g.*, 26 U.S.C.S. §§ 4001(a)(1), 4051(a)(1), 4064(a), 4081(a)(1)(A)(iv), 4161 (2011) (imposing an excise tax on, respectively, certain: luxury passenger vehicles; heavy trucks and trailers; gas-guzzlers; motor and aviation fuels; sporting goods).

[8] *See, e.g.*, 26 U.S.C.S. §§ 4071(a), 4121(a)(1), 4131(a), 4661(a), 4671(a), 4681(a) (2011) (imposing an excise tax on, respectively, certain: tires; coal; vaccines; chemicals; imported substances; ozone-depleting chemicals).

[9] *See, e.g.*, 26 U.S.C.S. §§ 5001(a)(1), 5041(a), 5051(a)(1), 5701(a)-(g) (2011) (imposing an excise tax on, respectively, certain: distilled spirits; wines; beer; tobacco products and cigarette papers and tubes).

[10] 26 U.S.C.S. §§ 4181, 5811(a), 5821(a) (2011).

[11] *See, e.g., United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363 (1998) (finding unconstitutional the Harbor Maintenance Tax from 26 U.S.C.S. § 4462(d)); *United States v. International Business Machines Corp.*, 517 U.S. 843, 863 (1996) (finding unconstitutional, as applied to casualty insurance on exported cargo, the excise tax on insurance policies issued by foreign

Government is likely to extend its defiance, taking advantage of the *Consolidation Coal* blueprint.

a. *Consolidation Coal* Will Encourage Agencies to Promulgate and Interpret Regulations in Ways that Limit Statutory Exemptions, Until They Have Been Limited Out of Existence.

Consolidation Coal teaches agencies that by regulation they can impose a tax on goods in the

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insurers from 26 U.S.C.S. § 4371) (hereinafter "*I.B.M.*"); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69-70 (1923) (finding unconstitutional a tax on baseball bats sold for exportation); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 27 (1915) (finding unconstitutional the federal stamp tax on policies insuring exports against marine risks); *United States v. Hvoslef*, 237 U.S. 1, 16-18 (1915) (finding unconstitutional the federal stamp tax on charter parties exclusively to carry cargo from the United States to foreign ports); *Fairbank v. United States*, 181 U.S. 283, 291 (1901) (finding unconstitutional the federal stamp tax on bills of lading for exported articles); *United States v. Gosho*, 23 F.2d 675, 675-76 (5th Cir. 1928) (finding unconstitutional the taxation of costs to transport cotton by rail from interior Texas to Galveston); *Princess Cruises v. United States*, 22 C.I.T. 796, 796 (1998) (finding the Harbor Maintenance Tax unconstitutional as applied to the embarkation of international cruise passengers); *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466, 468 (E.D. Va. 1998) (finding the Coal Excise Tax from 26 U.S.C.S. § 4121—frequently referred to as the Black Lung Excise Tax, not to be confused with the Coal Reclamation Fee from 30 U.S.C.S. § 1232 at issue in *Consolidation Coal*—unconstitutional as applied to exports, based on the "blanket prohibition imposed by the Export Clause and the Supreme Court holdings interpreting that clause").

export stream, as long as the regulation does not by its terms explicitly impose a "sales tax." The Federal Circuit decision further instructs that a sales tax exists only when the amount of tax varies as a function of the sales price. As a result, the Export Clause no longer protects against any taxes calculated based on unit measurements, *e.g.*, dollars per ton, gallon, *etc.*, no matter when the tax inflicts its damage, thereby opening a substantial gap in the full coverage intended by the Export Clause.[12]

A government agency can now issue regulations or otherwise tax exports by calculating the tax based on units of physical measurement. Under *Consolidation Coal*, this basis for calculation will never violate the Export Clause. In addition, an agency can limit its interpretation of tax on sale, thereby supporting a pretense that the agency is not denying even statutory exemptions from taxes on sale for export.[13] Although the Export Clause prohibits every tax on export sales, not every tax that the Export Clause prohibits is a sales tax.[14]

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[12] *See* 30 U.S.C.S. § 1232(a) (2010) (imposing fees on "coal produced"); 30 C.F.R. § 870.12(b) (July 1, 2010) (requiring fees to be "determined by the weight and value at the time of initial bona fide sale"); Coal Production Fees and Fee Allocations, 69 Fed. Reg. 56,122, 56,128 (Sept. 17, 2004) (amending the fees from 30 C.F.R. § 870.13 and applying them to subsequent sales, even if the coal to be sold had been extracted and stockpiled earlier).

[13] Moreover, even after a court has found that a specific tax violates the Export Clause, Congress usually does not bother to fix the statute, and the I.R.S. usually does not bother to fix its implementing regulations. *See, e.g.*, 26 U.S.C.S. §§ 4221(a)(2) and 4371 (2011) (still taxing, without exemption, respectively: coal, despite *Ranger Fuels*; certain policies issued by foreign insurers, despite *I.B.M.*); 26 C.F.R. §§ 46.4371-1 through 46.4374-1 (Apr. 1, 2009) (still providing no exemption for casualty insurance issued by foreign insurers on exported

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goods); and 48.4121-1(c)(2) (Apr. 1, 2009) (still stating that "no exemptions" from the Black Lung Excise Tax exist on sales of coal "for export"). True, seven years after *U.S. Shoe*, Congress enacted a statutory exemption stating that the Harbor Maintenance Tax "shall not apply to any port use with respect to any commercial cargo to be exported from the United States." 26 U.S.C.S. § 4462(d) (2011); *enacted as* Pub. L. No. 109-59, 119 Stat. 1144, § 11116(a) (2005). More often, however, only an Internal Revenue Bulletin gives notice that a court decision has forced the Government to change its implementation of an excise tax to comply with the Export Clause. *See, e.g.*, IRS Notice 2000-28, IRB 2000-21 at 1116-17 (May 22, 2000), available at http://www.irs.gov/pub/irs-irbs/irb00-21.pdf (last visited Feb. 15, 2011) (stating that the Government would stop collecting the Black Lung Excise Tax on exports); IRS, "Foreign Insurance Excise Tax—Audit Technique Guide," (Jan. 18, 2011), available at http://www.irs.gov/businesses/small/article/0,,id=186963,00.html (last visited Feb. 21, 2011) (stating that the Government would not apply the Excise Tax on Policies Issued by Foreign Insurance to casualty insurance premiums paid to foreign insurers for coverage of exported goods in transit to foreign destinations).

[14] *See I.B.M.*, 517 U.S. at 863 (finding unconstitutional, as applied to casualty insurance on exported cargo, the excise tax on insurance policies issued by foreign insurers from 26 U.S.C.S. § 4371); *Thames & Mersey*, 237 U.S. at 27 (finding unconstitutional the federal stamp tax on policies insuring exports against marine risks); *Hvoslef*, 237 U.S. at 16-18 (finding unconstitutional the federal stamp tax on charter parties exclusively to carry cargo from the United States to foreign ports); *Fairbank*, 181 U.S. at 291 (finding unconstitutional the federal stamp tax on bills of lading for exported articles). Evidence that the agency uses an export sale to trigger the tax or to calculate the amount of the tax might be *sufficient* but is therefore not *necessary* to a determination that the tax violates the Export Clause. Rather, the controlling (*both* necessary *and* sufficient) issue is *when* the agency applies the tax, relative to *when* the export began. *See*

As shown below, the Internal Revenue Service ("I.R.S.") has already substantially narrowed the scope of statutory exemptions from excise taxes through rulemaking. After *Consolidation Coal*, the I.R.S. and other agencies will confidently go further and create additional holes in the exemptions until the exemptions disappear entirely and the Export Clause loses all practical effect.

b. *Consolidation Coal* Will Allow a Tax's Statutory Label, Rather Than its Regulatory Impact, to Determine Whether It Is an Impermissible Tax on Goods as Exports.

In adopting the government's position that the reclamation fee statute at issue taxes the coal's extraction, rather than its sale, the Federal Circuit in *Consolidation Coal* took a contrived and problematic approach. The court said an agency's regulation imposing the tax on the weight and value of the coal at the time of sale should be regarded as merely the "calculation" of a manufacturing tax whose collection is "deferred" until sale.

A.G. Spalding, 262 U.S. at 69-70 (finding unconstitutional a tax on baseball bats delivered to the carrier for exportation, because title passed at the moment of pick-up and because the bats had therefore already entered the export stream); *Gosho*, 23 F.2d at 675-76 (finding unconstitutional the taxation of costs to transport cotton by rail from interior Texas to Galveston, even though the cotton was not compressed and appropriated to particular export sales contracts until after it arrived in Galveston).

Such a precedent allows the government to mischaracterize any tax on exports as a deferred calculation of a manufacturing tax. The Federal Circuit ignores this Court's strict adherence to the principle that an Export Clause violation is determined by the "operation and effect" of the subject tax rather than its label.[15]

Whether the statute expressly targets the "sale" of an article, an article "sold" or even an article "produced," the tax can still, depending on its application by the agency, burden exports.[16] Calculating the amount due based on the article's weight at time of sale, its value at time of sale, and the tax rate at time of sale, and imposing liability and collecting the tax only if a sale occurs, regulations similar to those in *Consolidation Coal* tax an export sale, even if the statute does not refer to a sales tax *per se*.

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[15] *See A.G. Spalding*, 262 U.S. at 69-70 (finding unconstitutional a tax on baseball bats sold for exportation).

[16] *See U.S. Shoe*, 523 U.S. at 363 (finding unconstitutional the Harbor Maintenance Tax from 26 U.S.C.S. § 4462(d) as applied to exported cargo, because the fee was imposed on an *ad valorem* basis and so did not fairly match the exporters' use of port facilities); *compare to Princess Cruises*, 22 C.I.T. at 796 (finding the Harbor Maintenance Tax unconstitutional as applied to the embarkation of cruise passengers).

c. *Consolidation Coal* Will Encourage Congress to Repeal Existing Statutory Exemptions or to Continue Enacting Export-Related Taxes without Providing Exemptions.

If this Court does not reverse *Consolidation Coal*, Congress will likely use it significantly to restrict or completely to remove existing tax exemptions for exports or to enact new taxes that lack such exemptions. Certain constituencies are begging Congress to rein in the burgeoning federal deficit. Others are asking Congress to find yet more cash for stimulating job-creation. The current historical moment sorely tempts the Government to ignore Export-Clause prohibitions—or at minimum further to dilute them.

Congress has already begun yielding to this temptation. A bill introduced in the U.S. House of Representatives on February 8, 2011 would subject *all* U.S. exports to a fee equaling ".075 percent of the value of the article that is subject to the fee or $500, whichever is less."[17] The bill ignores the Export Clause, as well as this Court's holding in *U.S. Shoe* and other cases. As explained below, the bill parallels certain other, previously enacted excise tax statutes that either still lack statutory exemptions (regarding coal, crude oil and policies issued by foreign insurers) or provide exemptions but substantially limit their application (to a period no longer than six months after sale or a geography no closer than 225 miles beyond the international border).

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[17] *See* H.R. 526, 112th Congress, § 3(b)(2)(A) (2011) (the "Our Nation's Trade, Infrastructure, Mobility, and Efficiency Act" or the "ON TIME Act"), available at http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.526.IH: (last visited Feb. 21, 2011).

2. Existing Excise Taxes Violating the Export Clause Demonstrate the Likelihood That the Government Will Tax Exports Further If This Court Does Not Close the Opening Created by *Consolidation Coal.*

The federal excise tax provisions generally contain express exemptions for export transactions;[18] Congress, however, has whittled away at the exemptions in a variety of ways. Sometimes, no such statutory exemption even appears.[19] For example, no statutory exemption applies to policies issued by foreign insurers to protect exported articles from casualty.[20] In a few instances, a statute expressly subjects to the excise tax a particular type of exported article—namely, coal and crude oil.[21] And at times, a built-in statutory exception taxes certain exportations within the larger, generally exempted group.[22] For instance, the sale of a luxury automobile for export is exempt only if the vehicle leaves the United States within six months, and the cost of flying a person overseas by air is exempt only for those miles that the person flies after reaching a point 225 miles beyond U.S. borders.[23]

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[18] *See, e.g.*, 26 U.S.C.S. §§ 4041(g)(3), 4082(f)(2), 4221(a)(2), 4272(b), 4462(d), 4662(e), 4682(d)(3), 5053(a), 5214(a)(4), 5362(c)(1), 5704(b), 5854 (2011) (making not applicable to exports the excise tax imposed, respectively, on certain: special fuels; motor and aviation fuels; luxury passenger automobiles, heavy trucks and trailers, gas guzzlers, tires, vaccines, sporting goods; transportation of property by air; port use; chemicals; ozone-depleting chemicals; beer; distilled spirits; wine; tobacco products and cigarette papers and tubes; firearms).

[19] *See, e.g.*, 26 U.S.C.S. § 4371 (2011) (taxing certain policies issued by foreign insurers but providing no statutory exemption for policies insuring exported articles). The statute remains in effect even though this tax was invalidated in *I.B.M.*, 517 U.S. at 845.

I.R.S. regulations further narrow the scope of the statutory exemptions, thereby diminishing the Export Clause even more. For example, one I.R.S. regulation provides that the general exemptions in 26 U.S.C. § 4221(a)(2) for exported luxury passenger automobiles, heavy trucks and trailers, gas guzzlers, tires, vaccines and sporting goods "apply only in those cases where the exportation . . . is to occur before any other use."[24] Another regulation similarly shrinks the 26 U.S.C. § 4221(a)(2) exemptions by arbitrarily restricting the number of steps that an exempted exportation may include: "An article may not be sold tax free under the provisions of this section by a manufacturer to a purchaser for resale to a second purchaser which does not intend to export the article itself but plans to resell it to a third purchaser for export."[25]

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[20] *See id.*

[21] *See, e.g.*, 26 U.S.C.S. §§ 4221(a)(2), 4611(b) (2011) (subjecting to an excise tax, without exemption, exports of, respectively: coal; crude oil).

[22] *See, e.g.*, 26 U.S.C.S. §§ 4221(b) and 4221(e)(2)(B) (2011) (ceasing the 26 U.S.C.S. § 4221(a)(2) exemptions for exported luxury passenger automobiles, heavy trucks and trailers, gas guzzlers, tires, vaccines and sporting goods when, despite a demonstrated export sale, the manufacturer has not, within six months after the earlier of that sale or the article's initial shipment, received proof that the article has left the United States); 26 C.F.R. §§ 48.4221-3(c) and 48.4221-7(c)(1) (Apr. 1, 2009) (same); *compare to* 26 U.S.C.S. §§ 4221(b) and 4221(e)(2)(B) (2011) (authorizing the exemption's temporal limitation); 26 U.S.C.S. § 4262 (2011) (providing that an exemption from the 26 U.S.C. § 4261(a) excise tax on transportation of persons by air generally does not cover the first 225 miles of travel beyond U.S. borders).

[23] *See id.*

All these laws contradict a specific finding of this Court in *A.G. Spalding*: "The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."[26] Once an exported article is in transit and exportation has begun, no federal tax may impose burdens that ignore the time it can take an article to exit U.S. borders and an exportation to end.

Other, similarly random regulatory preconditions accompany specific tax exemptions. For instance, should an export sale of motor and aviation fuels occur as they are delivered into a transport vessel, the excise tax exemption from 26 U.S.C. § 4082(f)(2) applies only if, among other things, "[t]he vessel has a capacity of at least 20,000 barrels of fuel."[27] Should an exporter sell vaccine to the U.S. Government for use abroad, the 26 U.S.C. § 4221(a)(2) exemption applies only if, among other things, the Government gives notice that it intends to use the vaccine other than to vaccinate U.S. citizens serving the U.S. Government outside the United States.[28] Moreover, even when an exemption from excise taxes does apply, the exporter who has paid the tax and then sought a refund must, by regulation, forego any interest on the refund that results.[29]

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[24] 26 C.F.R. § 48.4221-1(a)(2)(vi) (Apr. 1, 2009); *compare to* 26 C.F.R. § 48.6416(b)(2)-2(a) (Apr. 1, 2009) (same).

[25] 26 C.F.R. § 48.4221-3(a)(1) (Apr. 1, 2009).

[26] *Id.*, 262 U.S. at 69-70; *compare to Gosho*, 23 F.2d at 676 (stating, "The temporary stoppage at Galveston for sorting and compression was reasonable and necessary for transshipment, in order to enable the cotton to reach its destination, and cannot be considered as interrupting the export movement").

In the shadow of these regulations lurk many onerous related evidentiary requirements, whereby the I.R.S. has further shrunk statutory exemptions and eroded the Export Clause.[30] These regulatory requirements undercut Export Clause prohibitions and foster more unconstitutional regulatory activity, which the Government can now expand using misjudgments from *Consolidation Coal*.

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[27] 26 C.F.R. § 48.4081-3(f)(2)(iii) (Apr. 1, 2009).

[28] *See* 26 C.F.R. §§ 48.4221-1(a)(2)(v), 48.4221-3(c)(2) and 48.6416(b)(2)-2(b)(2) (Apr. 1, 2009) (providing for a "cessation of exemption" in certain circumstances)

[29] *See* 26 C.F.R. §§ 48.6416(b)(2)-1 and 48.6416(c)-1(a) (Apr. 1, 2009) (regarding "overpayments of tax" on certain exportations).

[30] *See, e.g.*, 26 C.F.R. §§ 48.4041-16(b); 48.4221-1(c)(1) and 48.4222(a)-1; 48.4221-1(c)(2), 48.4221-3(b), and 48.4222(b)-1(b); 48.4221-1(b)(4)(ii); 48.4221-3(d); 48.6416(b)(2)-3 and 48.6416(b)(2)-4 (Apr. 1, 2009) (requiring, respectively: a retailer selling special fuels for export to obtain documentary proof from carriers, foreign customs officers or foreign consignees; certain U.S. purchasers to register and to furnish sellers with timely written notice of purchasers' registration numbers and their intentions with regard to exportation; certain foreign purchasers to provide sellers with timely written evidence that articles will be transported to a foreign destination before further use; manufacturers to inform purchasers that exportation triggers a tax exemption and purchasers to inform manufacturers if articles are diverted

B. ECONOMIC RECOVERY NECESSITATES VIGILANCE AGAINST GOVERNMENTAL ACTIONS THAT WOULD IMPOSE ANY BURDEN ON EXPORTS.

The current economic environment amplifies the injury that will be suffered if *Consolidation Coal* is permitted to stand and to limit the protections of the Export Clause. In his 2010 State of the Union address, President Obama committed the Government to work with U.S. companies and help American-made goods and services succeed in global markets with the aim of doubling U.S. exports in five years. According to a September 2010 report to the President from the Export Promotion Cabinet and the Trade Promotion Coordinating Committee (the "Report"), the National Export Initiative ("NEI") is a key component of the President's plan to help the "United States transition from the legacy of the most severe financial and economic crisis in generations to a sustained recovery."[31] This importance was

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from the export stream; U.S. and foreign purchasers to furnish sellers with timely, acceptable proof of actual exportation; refund claimants to make certified statements regarding the articles involved, to submit and retain supporting evidence, and to obtain certifications from ultimate purchasers and vendors).

[31] Export Promotion Cabinet and Trade Promotion Coordinating Committee, *Report to the President on the National Export Initiative: The Export Promotion Cabinet's Plan for Doubling U.S. Exports in Five Years* at 1 (Sept. 2010), available at

reiterated in the March 2011 Trade Policy Agenda issued by the United States Trade Representative.[32] As the Report explains, export growth is needed for various reasons, including:

- *The size of and potential growth in the consumer market outside the United States.* According to the Report, "95 percent of the world's customers lie outside the United States."[33] The International Monetary Fund predicts that "nearly 87 percent of world economic growth over the next five years will take place outside of the United States."[34] U.S. businesses' ability to tap into this growth abroad will be critical to the stability and prosperity of the U.S. economy going forward.[35] Thus, exports will play a vital role in creating strong, sustainable economic growth.[36]

- *The current importance of exports to the U.S. economy.* Exports have represented over ten percent of Gross

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http://www.whitehouse.gov/sites/default/files/nei_report_9-16-10_full.pdf (last visited Mar. 1, 2011) ("NEI Report").

[32] Office of the United States Trade Representative, *2011 Trade Policy Agenda and 2010 Annual Report of the President of the United States on the Trade Agreements Program* at 1 (March 2011), available at http://www.ustr.gov/webfm_send/2597 (last visited Mar. 4, 2011).

[33] NEI Report at 1.

[34] *Id.* at 11.

[35] *See id.*

[36] *See id.* at 8.

Domestic Product ("GDP") annually since 1994 (averaged over the period), rising to a high of nearly 13 percent in 2008.[37] While exports fell during the recession, they have been instrumental in the recovery, contributing "more than one percentage point to GDP growth (at an annual rate)" in each of the quarters of recovery and "over 1.5 percentage points to growth in the last year" (more than either consumption or fixed investment).[38] Moreover, since 1994, exports have supported over seven million jobs each year, with their most significant impact in 2008, when they supported over 10 million jobs.[39] Manufacturing relies particularly heavily on exports, with exports supporting "over a third" of the jobs in that sector.[40] Exporting also improves productivity and increases wages.[41] As the United States increases exports successful companies grow and are better equipped to focus U.S. production in areas where American workers excel and can earn higher wages.[42]

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[37] *See id.*

[38] *Id.* at 10.

[39] *See id.* at 9.

[40] *See id.* at 2.

[41] *See id.*

[42] *See id.*

- *The numerous obstacles companies currently must overcome to export.* Information about exporting and market research is not readily available.[43] Companies also frequently face financial hurdles. First, they struggle to obtain export financing. Then, they face strong financial competition from both foreign companies and foreign governments.[44]

- *The importance of small and medium-sized enterprises ("SMEs") to the U.S. economy.* SMEs "account for about half of all employment and economic activity in the United States."[45] They comprise 97% of all identified exporters and account for 31% of total export value.[46] The obstacles highlighted above are magnified for SMEs, whose resources are already limited.[47] The costs of exporting, particularly the substantial initial costs, tend to have a disproportionate effect on SMEs.[48] SMEs are therefore a key part of the Administration's export plans.[49]

If permitted, taxation of exports will serve as yet another obstacle for U.S. exporters to overcome. The fragile national economic recovery necessitates heightened vigilance against decisions, such as *Consolidation Coal*, that undermine Export Clause protections. *Consolidation Coal* gives the government the latitude to tax goods, as long as the tax is not imposed on the sale itself or based on the sales price. Such attempts to dilute the protections of the Export Clause must not be permitted.

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[43] *See id.*

[44] *See id.*

[45] *Id.* at 10.

[46] *See id.*

[47] *See id.* at 11.

[48] *See id.*

[49] *See id.* at 5.

In *I.B.M.*, this Court firmly rejected the government's attempt to narrow the sweeping protections of the Export Clause.[50] Summarizing the history of the Export Clause, the *I.B.M.* Court emphasized the depth and breadth of the Clause's prohibitions:

> As a purely historical matter, the Export Clause was originally proposed by delegates to the Federal Convention from the Southern States, who feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South. . . . The Government argues that this "narrow historical purpose" justifies a narrow interpretation of the text and that application of § 4371 to policies insuring exports does not conflict with the policies embodied in the Clause. . . . While the original impetus may have had a narrow focus, the remedial provision that ultimately

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[50] *Id.*, 517 U.S. 843, 845-46 (1996).

> became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language. *See*, *e.g.*, 2 Farrand, Records of the Federal Convention, at 220 (Mr. King: "In two great points the hands of the Legislature were absolutely tied. The importation of slaves could not be prohibited—exports could not be taxed"); *id.*, at 305 ("Mr. Mason urged the necessity of connecting with the power of levying taxes . . . that no tax should be laid on exports"); *id.*, at 360 (Mr. Elseworth *[sic]*: "There are solid reasons agst. Congs taxing exports"); *ibid.* ("Mr. Butler was strenuously opposed to a power over exports") *id.*, at 361 (Mr. Sherman: "It is best to prohibit the National legislature in all cases"); *id.*, at 362 ("Mr. Gerry was strenuously opposed to the power over exports").[51]

As the Framers recognized, only an absolute prohibition against taxes on exported articles will be sufficient to protect them. If any burden is imposed on such goods, the damage is done. Thus, the Export Clause cannot permit exceptions for taxes that are not sales taxes or that are imposed on a unit measurement of the goods rather than their sales price.

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[51] *Id.*, 517 U.S. at 859-60 (certain citations omitted, emphasis added).

C. *CONSOLIDATION COAL* CREATES BUSINESS UNCERTAINTY BY THREATENING TO TAX EXPORTS.

The *Consolidation Coal* decision creates confusion in how excise tax statues will be interpreted, leading to uncertainty for businesses. Following *Consolidation Coal*, Congress may rework existing excise tax statutes in an effort to evade the Export Clause prohibition. Congress could change references from "sale of X" or "X sold" to "X produced," the language used in *Consolidation Coal*. As discussed earlier, however, *Consolidation Coal* blurs the distinction between "sale" of articles, articles "sold" and articles "produced," leaving open the possibility that a court could find a tax in any of the three categories to be a pre-exportation event.

Further complicating the situation for businesses, Congress's past actions indicate it has not espoused the same interpretation as the court in *Consolidation Coal*. Congress has previously inserted export exemptions into excise tax statutes even when they target "X produced" or "X manufactured."[52] To whatever extent adherence to the Constitution's prohibition against taxation of exports may have motivated Congress, such exemptions imply that, in Congress's view, the corresponding excise taxes would likely violate the Export Clause without them.

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[52] *Compare* 26 U.S.C.S. §§ 5001(a)(1), 5041(a), 5051(a)(1), 5701 (2011) (imposing an excise tax on, respectively, certain: distilled spirits; wines; beer; tobacco products and cigarette papers and tubes) *and* 26 U.S.C.S. §§ 5053(a), 5214(a)(4), 5362(c)(1), 5704(b) (2011) (making *not* applicable to exports the excise tax imposed, respectively, on certain: beer; distilled spirits; wine; tobacco products and cigarette papers and tubes).

V. CONCLUSION

Whichever strategy the Government adopts after *Consolidation Coal*, the Government will in fact be taxing export sales by pretending that the Government is merely "collecting" at time of sale certain taxes "incurred" at time of manufacture. *Consolidation Coal* therefore not only ignores the Export Clause but also sets off an immediate peril that further unconstitutional action by the Government will burgeon. Even before *Consolidation Coal*, periodic Governmental overreaching has tested the Export Clause in the context of federal excise taxes. In every instance, only court action has halted the Government's attempts to weaken Constitutional limits.

The Federal Circuit's *Consolidation Coal* decision:

- Merits review because the decision violates the Export Clause and contravenes the Court's previous cases interpreting the Export Clause;

- Encourages both the Executive and the Legislative Branches, desperately seeking revenues that might combat massive deficits, to create loopholes in laws and regulations that contravene the Constitutional prohibition against taxing exports; and

- Threatens to injure exporters, especially small and medium-sized ones, at a time when the U.S. economy can ill afford any additional harm.

Therefore, this Court should grant the Petition of Consolidation Coal Corporation *et al.* for Writ of Certiorari to the U.S. Court of Appeals for the Federal Circuit.

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CONSOLIDATION COAL COMPANY ET AL.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

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QUESTIONS PRESENTED

1. Whether the canon of avoidance may be applied to re-characterize arguably unconstitutional government conduct as constitutional, rather than to construe the permissible scope of government conduct in the first instance?
2. Whether the *Chevron* doctrine that courts must defer to reasonable agency interpretations of ambiguous federal statutes trumps the canon of constitutional avoidance?

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INTEREST OF AMICI

Amici are scholars of constitutional and public law.[1] Our teaching and scholarly writing concerns the canon of constitutional avoidance in statutory construction, the relationship between Congress, federal administrative agencies, and the courts, and the constitutional values that the avoidance doctrine protects.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

Bird Professor at Duke Law School, where he teaches Constitutional Law and Federal Jurisdiction.

SUMMARY OF THE ARGUMENT

This case raises fundamental questions about the doctrine that courts interpret an ambiguous federal statute to avoid serious constitutional doubts about that statute's validity. The Federal Circuit applied that rule in two ways in the present litigation. First, it construed the tax on coal imposed by the Surface Mining Control and Reclamations Act of 1977 (SMCRA), 30 U.S.C. § 1232(a), on "coal produced" in the United States to apply to the *extraction* of coal. The court of appeals reasoned that a tax on the *sale* of coal would violate the Export Clause of the Constitution. In reaching that holding the Federal Circuit refused to follow either the interpretation adopted by the Office of Surface Mining Reclamation and Enforcement (OSM) after notice and comment rulemaking or a decision of the D.C. Circuit deferring to OSM's interpretation.

Second, the Federal Circuit characterized OSM's prior practice in implementing the reclamation tax to amount to a tax on coal extraction as well. The court of appeals reached that conclusion, notwithstanding the fact that OSM had actually assessed the tax upon the sale of coal. Thus, OSM had calculated the tax according to the coal's weight and value at the time of sale rather than extraction, and moreover had not taxed coal that had been extracted but remained unsold. The court of appeals thus took the unusual step of applying the avoidance canon not to interpret how the tax shall be constitutionally applied but rather to *re-characterize* what the Government had done in the past as constitutional rather than unconstitutional.

Amici contend that both these uses of the avoidance canon raise questions worthy of consideration by this Court. The Federal Circuit's construction of the OSM's past implementation of the tax through its regulation fundamentally departed from the canon's ordinary operation in a way that threatens to distort significantly how that canon functions in constitutional litigation. There is no dispute in this case about how the reclamation tax has historically operated; the court of appeals thus did not "avoid" constitutional questions under the Export Clause by construing the tax to apply more narrowly or at an earlier time in the production process. Rather, the debate concerned whether a tax assessed at sale should nonetheless be characterized as a tax on extraction. By using the avoidance canon to answer that question in the affirmative, the Federal Circuit turned the canon into a strong presumption of constitutionality that operates whenever governmental conduct may plausibly be described in more than one way. This radical new version of the avoidance canon effectively *narrows* the operative force of constitutional principles.

The Federal Circuit's construction of the underlying statute also raises important questions about the interaction between the avoidance canon and *Chevron*'s doctrine of deference to administrative agencies. By rejecting a *Chevron*-based interpretation of the tax as falling on sale and instead adopting a contrary interpretation to avoid problems under the Export Clause, the court of appeals held that *Chevron* does not trump avoidance concerns. It thus sided with the Tenth Circuit against the Second and Ninth Circuits, which have held that courts lack authority to avoid constitutional questions by rejecting prior interpretations by agencies. *Amici* agree with Petitioners that this question is certworthy, although we do not share Petitioners' view that *Chevron* should prevail in this situation. Nonetheless, this disagreement does not alter our view that, given the Federal Circuit's misapplication of the avoidance doctrine to this case, the judgment below should be reversed.

ARGUMENT

I. The Avoidance Doctrine Does Not Permit Courts to Re-characterize Past Government Conduct as Lawful.

This Court's leading decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), illustrates the proper operation of the doctrine of constitutional avoidance. In *DeBartolo*, the National Labor Relations Board (NLRB) had barred peaceful handbilling by a union pursuant to § 8(b)(4) of the National Labor Relations Act, which says a union may not "threaten, coerce, or restrain" any person to make the person cease doing business with another person. Although the union argued that construing this provision to reach peaceful handbilling would violate the First Amendment, the agency rejected this argument, stating that "as a congressionally created administrative agency, we will presume the constitutionality of the Act we administer." 485 U.S.

at 573 (quoting 273 N.L.R.B. 1431 (1985)). This Court rejected the NLRB's interpretation, holding that "the Board's construction of the statute . . . poses serious questions of the validity of § 8(b)(4) under the First Amendment." *Id.* at 575. The Court thus applied the "elementary rule" of constitutional avoidance: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.*

In *DeBartolo*, the Court construed the NLRA not to apply to the union's conduct, because the NLRB's interpretation would have raised serious questions about the constitutionality of the statute. The Court did *not* do what the Federal Circuit did in the present case, which was to leave the Government's past action unaltered and "avoid" the constitutional question simply by recharacterizing the Government's action as constitutional. The Federal Circuit's approach to avoidance—if allowed to stand by this Court—has the potential to radically alter the meaning of the avoidance rule in a broad range of constitutional challenges to government action.

A. The Federal Circuit's holding in this case transformed the avoidance canon from a means of shielding constitutional values to a tool for narrowing those values.

The avoidance doctrine ordinarily applies to determining what a statute or regulation *does*—that is, what it requires, how far it extends, and the like. The doctrine tends to narrow governmental enactments by construing them not to extend into constitutional "danger zones." At an earlier stage of the present litigation, the Federal Circuit properly determined that it could avoid a constitutional difficulty under the Export Clause if it construed the statutory language "coal produced" to apply only to coal *extracted*—not to coal *sold*. *Consolidation Coal Co. v. United States*, 528 F.3d 1344, 1348 (Fed. Cir. 2008) (*Consol III*).[2] It thus narrowed the statutory tax to apply only to extraction rather than sale, because a tax on sale would violate the Export Clause's prohibition of "any federal tax . . . on goods in export transit." *United States v. United States Shoe Corp.*, 523 U.S. 360, 367 (1998).

The Federal Circuit's subsequent decision after remand, however, did something radically different. In that opinion, the question was whether the OSM's historical implementation of the tax under its regulation implementing and assessing the tax comported with the underlying statute. *Consolidation Coal Co. v. United States*, 615 F.3d 1378, 1381 (Fed. Cir. 2010) (*Consol V*). Importantly, the parties agreed about what the regulation *did*: All agreed about when the tax applies and how it is calculated. The only question was how to characterize the tax imposed by OSM's regulation—as a tax on extraction or as a tax on sale. The parties agreed that a tax on extraction would be permissible, but that a tax on sale would violate not only the statute (as construed in *Consol III*) but the Export Clause as well.

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[2] To avoid confusion, we employ the same numbering system that the Federal Circuit did in the decision under review. That system includes both the Court of Federal Claims decisions and the Federal Circuit's decisions in this case.

The Federal Circuit's innovation was to apply the avoidance doctrine not to interpret what the law prescribes, but to characterize what the Government had already done. In *Consol V*, the Federal Circuit invoked constitutional avoidance to characterize the tax already assessed by the OSM as a tax on extraction rather than a tax on sale. Ordinarily, the avoidance doctrine narrows or otherwise limits government action that might otherwise transgress constitutional norms. Here, however, the Federal Circuit's approach to avoidance broadened the Government's latitude by retroactively interpreting the Government's actions as constitutional. The appeals court adopted, in essence, the very position that *DeBartolo* rejected when the Court said that the NLRB was not entitled to simply presume that whatever Congress did was constitutional. The Federal Circuit's avoidance doctrine is thus a presumption that government actions are constitutional—but one that operates by recasting government conduct to always fall on the right side of the constitutional line.

This "tie goes to the runner" approach to constitutional avoidance could have far-reaching consequences if left uncorrected. Constitutional law is replete with close questions of characterization. Consider two hypothetical cases:

Case #1: A free speech case in which, under the limited-public-forum doctrine, the government may restrict discussion to certain subjects but may not discriminate on the basis of viewpoint. The question is whether an exclusion of religious perspectives should be characterized as impermissible viewpoint discrimination or permissible subject-matter restrictions. *Cf. Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). If a court invoked the avoidance doctrine as a reason to characterize what the government did as permissible subject-matter restrictions, it would be making a category mistake.

Case #2: A Fourth Amendment case in which it is unclear whether the police acted with probable cause. A court plainly could not invoke the avoidance doctrine to characterize what the government did as legal.

By using the avoidance doctrine to construe problematic government action as legitimate—in effect, to view the Government's conduct in the best possible light—the Federal Circuit's approach effectively narrows the scope of constitutional rights by making it substantially more likely that government action impinging on those rights will be upheld.

B. The Federal Circuit's approach implicates traditional criticisms of the avoidance canon while capturing none of its virtues.

The avoidance doctrine is sometimes criticized for causing courts to reject an otherwise-persuasive reading of a statute or regulation on the basis of a constitutional "doubt" without engaging in the careful analysis of the constitutional question that would follow if the court were to actually reach and decide the constitutional question.[3] Moreover, because at least some proportion of "doubtful" constitutional questions would presumably be resolved in the Government's favor if the courts were actually to reach and decide them, rejecting an otherwise-favored statutory construction on avoidance grounds tends to expand the impact of constitutional limits. As Judge Posner has argued, the canon sometimes creates a "judge-made constitutional 'penumbra' that has much the same prohibitory effect as the . . . Constitution itself." Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 816 (1983).

We do not take any position here concerning whether these criticisms would warrant limiting or altering the avoidance canon; the important point is that the Federal Circuit's version of the avoidance doctrine implicates the same concerns without furthering any of the canon's countervailing virtues. The Federal Circuit's approach encourages the same cursory constitutional analysis that is sometimes imputed to the traditional avoidance doctrine, but in the opposite direction: In this case, for example, the court of appeals simply relied on the avoidance canon to characterize the tax as one on extraction, rather than engaging in the careful analysis of the incidence of the tax that would have been required had the court actually decided the constitutional issue.

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[3] *See, e.g.*, Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 90 (worrying that because courts applying the avoidance canon purport not to actually *decide* the constitutional question, courts "produce in reality the supposedly disfavored outcome of constitutional adjudication without the safeguard of reasoned elaboration that we associate with the exercise of that power"); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. Davis L. Rev. 1, 23 (1996) (arguing that "use of the canon yields changes in constitutional law without the protection of reasoned elaboration and without the Court taking responsibility for directly addressing constitutional questions").

Similarly, the Federal Circuit's approach creates a "penumbra" problem. Here, however, the penumbra surrounds the Government's action—not the constitutional provision at issue—ensuring that government acts will be characterized in a way that does not offend the Constitution if the case is at all close. As we have already noted, this rule has the effect of *narrowing* the scope of constitutional guarantees.

The Federal Circuit's decision in this case thus illustrates considerable confusion concerning the nature and proper application of the doctrine of constitutional avoidance. This case provides an excellent vehicle for resolving that confusion and demonstrating the doctrine's proper implementation.

II. Whether the Canon of Avoidance Trumps *Chevron* Deference Is an Important Question that Should Be Resolved by this Court.

The Federal Circuit's decision in *Consol V* relied on its earlier construction of the SMCRA in *Consol III* as imposing a tax on extraction rather than sale. *Consol III*'s construction of the statute rejected a contrary reading of the statute by the D.C.

Circuit in *Drummond Coal Co. v. United States*, 796 F.2d 503 (D.C. Cir. 1986). *See Consol III*, 528 F.3d at 1347-48. Both the Federal Circuit and the D.C. Circuit agreed that the SMCRA was ambiguous as to whether the tax was imposed on extraction or sale of the coal. Unlike *Consol III*, however, *Drummond* resolved that ambiguity by deferring under *Chevron U.S.A. Inc. v. National Resource Defense Council*, 467 U.S. 837 (1984), to the OMS's position that the tax should fall on sale. *See Drummond*, 796 F.2d at 507. The Federal Circuit, however, rejected *Chevron* deference because the avoidance doctrine pointed toward the opposite construction of the statute. *Consol III*, 528 F.3d at 1348.

A. The interaction of *Chevron* and the various canons of construction is pervasively important.

Federal statutes are frequently ambiguous. When an agency administers a statute, ambiguity may trigger *Chevron* deference (provided the other conditions for deference are met), but whenever the statute is susceptible to constitutional challenge, the same ambiguity frequently triggers the avoidance canon. This conflict can arise anywhere across the vast spectrum of federal regulatory action, and it has already created a split among the circuits as to how to proceed. *Compare, e.g., Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2nd Cir. 2008) ("[O]nce an ambiguous statute has been interpreted by the agency in charge of its implementation, we lack the authority to re-construe the statute, even to avoid potential constitutional problems.") (internal quotation marks omitted), *and Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007) ("[T]he constitutional avoidance doctrine . . . plays no role in the [step two] *Chevron* inquiry.") (Kozinski, J.), *with Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008) (McConnell, J.) (concluding that "constitutional avoidance *can* operate to preclude agency interpretations which raise substantial constitutional doubts").[4]

A related question arises concerning the interaction of *Chevron* and *other* canons of construction, such as the rule of lenity, see, e.g., *Bell v. United States*, 349 U.S. 81, 83 (1955), or the various federalism-based "clear statement" rules, *see, e.g. Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). These canons often are related to the avoidance canon itself—the rule of lenity, for example, may help avoid due process concerns about unclear criminal statutes, while the federalism canons sometimes help avoid constitutional concerns about the reach of Congress's power. *See, e.g., Jones v. United States*, 529 U.S. 848, 858 (2000) (holding that Congress must speak clearly to regulate at the outer limit of its Commerce Clause authority). These more specific canons, however, also often serve purposes beyond merely avoiding constitutional questions; indeed, sometimes these canons are the only means available for *enforcing* certain otherwise under-enforced constitutional norms. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms,*

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[4] *See also Morales-Izquierdo*, 486 F.3d at 503-04 (Thomas, J., dissenting) (arguing that while the avoidance doctrine may not be relevant at step two of *Chevron*, it is "highly relevant at *Chevron* step one").

and the Preservation of Judicial Review, 78 Texas L. Rev. 1549, 1603-09 (2000).

It is thus important that, if the Court decides that the avoidance canon itself does not trump *Chevron* deference, the Court distinguish between the pure avoidance situation and these other canons. This case does not present the question whether *Chevron* deference overrides canons of construction designed to safeguard particular constitutional values, as opposed to the general value of avoiding unnecessary adjudication of constitutional questions.

B. The best answer is that the avoidance canon *should* trump *Chevron*.

On this question, we believe that the Federal Circuit got it right in *Consol III*—that is, that the avoidance doctrine requires federal courts to interpret statutes to avoid a serious constitutional doubt, even if the agency that enforces that statute has adopted a contrary interpretation. Notwithstanding the circuit split that has developed on the question, this Court's cases mandate that proposition. In *Hernandez-Carrera*, 547 F.3d at 1250, Judge McConnell considered it "well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due." As he pointed out, *DeBartolo* itself rejected—on avoidance grounds—the NLRB's interpretation of an ambiguous statute. Likewise, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001), this

Court rejected an agency's plea for *Chevron* deference on the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."

Applying the avoidance canon in agency cases comports with this Court's interpretation of *Chevron* as resting on Congress's intent to delegate interpretive authority to an agency. As this Court has frequently recognized, the avoidance canon is "a means of giving effect to congressional intent, not of subverting it." *Clark v. Martinez*, 543 U.S. 371, 382 (2005).[5] The avoidance canon is thus consistent with the structure of the *Chevron* inquiry. *Chevron* step one requires a court to consider whether the statute is unambiguous using all the traditional tools of statutory construction. The avoidance canon is such a tool. This Court's opinion in *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 985 (2005), confirmed this logic when it noted that the court of appeals had "invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to reach its judgment." *Brand X* thus recognized that a court could properly find that Congress had *not* delegated interpretive authority to the agency either on the basis of plain statutory text *or* on the basis of some "other rule of construction"—that is, a canon like the rule of lenity or the avoidance canon.

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[5] *See also DeBartolo*, 485 U.S. at 575 ("This [avoidance] approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

Finally, judicial enforcement of the avoidance canon as a constraint on *Chevron* deference reflects the comparative institutional competences of agencies and courts. Holding that *Chevron* trumps the avoidance canon would effectively give agencies the primary authority for construing federal statutes to avoid constitutional doubts. Because an agency's interpretation of an ambiguous statute would bind the federal courts, the only opportunity for constitutional avoidance would occur when the agency interpreted the statute in the first instance. But this method makes little sense in terms of *Chevron*'s underlying rationale. As this Court has explained, it is plausible to construe statutory ambiguity as a congressional delegation of interpretive authority to the administering agency under *Chevron* because agencies are (a) more democratically accountable and (b) more expert than courts within the scope of the particular statute they administer. Neither of these rationales applies in the avoidance context.

Constitutional values implicate the courts' countermajoritarian mission. *See, e.g.*, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). The agency's greater democratic accountability hardly favors relying on agencies to apply the avoidance canon. Like the NLRB in *DeBartolo*, agencies are more likely than courts to discount constitutional concerns in the face of public pressure and deference to political actors. After all, agencies serve as agents of—not checks upon—the political branches. They are ill-suited to play a countermajoritarian role.

Likewise, agencies are not particularly expert at constitutional interpretation, to the extent that their organic statutes allow them to consider constitutional challenges at all. *See, e.g.*, Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 758 (2008) (noting that "agencies know little about constitutional law"). Constitutional questions generally will not implicate the agency's technical or scientific expertise. Federal courts are, in most cases, more familiar with the constitutional issues raising to constitutional doubts and thus better positioned to determine whether those doubts are serious. Just as federal courts would never defer to an agency's interpretation of an ambiguous *constitutional* provision, there is no reason to allow an agency to conclusively determine whether a statute should be interpreted to avoid a constitutional problem.

C. The Federal Circuit's correct resolution of the conflict between the avoidance doctrine and *Chevron* does not save its application of the avoidance doctrine to the OMS's regulation.

This Court should clearly hold that courts should apply the avoidance doctrine even in the face of a contrary interpretation by the federal agency that administers the relevant statute. However, even though the Federal Circuit was right not to defer to the agency's prior interpretation of the tax statute at issue in this case, the court of appeals fundamentally misunderstood the way the avoidance canon works. It was wrong to apply that canon in *Consol V* to the *regulation*, because it was clear (and undisputed) how that regulation applied to the situation at issue. The right application of the avoidance canon would have been to hold the regulation inconsistent with the underlying statute.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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